UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

- x

In re:

08-13555(JMP)

LEHMAN BROTHERS HOLDINGS INC., (Jointly Administered)

et al.,

Debtors.

- x

In re:

08-01420(JMP)(SIPA)

LEHMAN BROTHERS INC.,

Debtor.

- x

In re:

12-10063(JMP)

LEHMAN BROTHERS AUSTRALIA

LIMITED,

Debtor.

- x

LEHMAN BROTHERS HOLDINGS
INC., et al.,
Plaintiffs,
v. 12-01044(JMP)
CITIBANK, N.A., et al.,
Defendants.
- x
LEHMAN BROTHERS HOLDINGS
INC., et al.,
Plaintiffs,
v. 13-01431(JMP)
DR HC TSCHIRA BETEILIGUNGS
GmbH & Co. KG,
Defendants.
- x
FIRST BANK PUERTO RICO,
Plaintiff,
v. 10-04103(JMP)
BARCLAYS CAPITAL, INC.,
Defendant.
- x
U.S. Bankruptcy Court
One Bowling Green
New York, New York

October 23, 2013

10:04 AM

B E F O R E :

HON JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing re: Motion of Baupost Group, LLC to Quash Debtors' Subpoena Issued Under Federal Rule of Bankruptcy Procedure 2004 [ECF No. 38941]

Hearing re: In re Lehman Brothers Australia Limited Status Conference [Case No. 12-10063] – Status Conference

Hearing re: Lehman Brothers Holdings Inc., et al. v. Citibank, N.A., et al. [Adversary Case No. 12-01044] – Motion Provisionally Allowing Claims

Hearing re: Lehman Brothers Holdings Inc., et al. v. Dr. HC Tschira Beteiligungs GmbH & Co KG [Adversary Case No. 13-01431] – Pre-Trial Conference and Informal Rule 7007.1 Conference on Tschira's Motion for Protective Order

Hearing re: FirstBank Puerto Rico v. Barclays Capital, Inc. [Adversary Case No. 10-04103] – Motion for Civil Contempt

Sanctions

Hearing re: Motion of Fidelity National Title Insurance Company to Compel Compliance with Requirements of Title Insurance Policies [ECF No. 11513]

Hearing re: Motion of Giants Stadium LLC for Leave to Conduct Discovery of LBI Pursuant to Federal Rule of Bankruptcy Procedure 2004 [ECF NO. 36874]

Hearing re: Motion of Giants Stadium LLC for Authorization to Issue Third-party Deposition Subpoenas Under Federal Rules of Bankruptcy Procedure 2004 and 9016 [ECF No. 39898]

Hearing re: Motion of FirstBank Puerto Rico for (1) Reconsideration, Pursuant to Section 502(j) of the Bankruptcy Code and Bankruptcy Rule 9024, of the SIPA Trustee's Denial of FirstBank's Customer Claim, and (2) Limited Intervention, Pursuant to Bankruptcy Rule 7024 and Local Bankruptcy Rule 9014-1, in the Contested Matter Concerning the Trustee's Determination of Certain Claims of Lehman Brothers Holdings Inc. and Certain of its Affiliates [LBI ECF No. 5197]

Transcribed by: Dawn South & William J. Garling

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for the Debtors
767 Fifth Avenue
New York, NY 10153-0119

BY: RICHARD W. SLACK, ESQ.
ALFREDO R. PEREZ, ESQ.

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
Attorney for the Debtors
101 Park Avenue
New York, NY 10178-0061

BY: TURNER P. SMITH, ESQ.

SULLIVAN & CROMWELL LLP
Attorney for Baupost
125 Broad Street
New York, NY 10004-2498

BY: MATTHEW A. SCHWARTZ, ESQ.

KIRKLAND & ELLIS LLP
Attorney for the Liquidators
300 North LaSalle Street
Chicago, IL 60654

BY: JEFFREY W. GETTLEMAN, ESQ.

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Attorneys for the Official Committee of Unsecured Creditors
51 Madison Avenue, 22nd Floor
New York, NY 10010

BY: SUSHELL KIRPALANI, ESQ.
JAMES C. TECCE, ESQ.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Attorneys for Citibank
1285 Avenue of the Americas
New York, NY 10019-6064

BY: STEPHEN J. SHIMSHAK, ESQ.
CLAUDIA HAMMERMAN, ESQ.
REBECCA R. COHEN, ESQ.

JONES DAY
Attorney for the Debtor in No. 4
222 East 41st Street
New York, NY 10017-6702

BY: JAYANT W. TAMBE, ESQ.

DECHERT LLP
Attorneys for Defendants
1095 Avenue of the Americas
New York, NY 10036-6797

BY: ALLAN BRILLIANT, ESQ.
DAVID A. KOTLER, ESQ.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Barclays
One Liberty Plaza
New York, NY 10006-1470

BY: BOAZ S. MORAG, ESQ.
MARK E. MCDONALD, ESQ.
MATTHEW VANEK, ESQ.

DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, NY 10019-6708

BY: JEFFREY A. MITCHELL, ESQ.
JUDITH R. COHEN, ESQ.

P R O C E E D I N G S

THE COURT: Good morning, be seated, please.

Mr. Slack, how are you?

MR. SLACK: Good morning, Your Honor. The first matter on for the omnibus hearing is the motion by Baupost to quash the subpoena issued under 2004 by the debtors. It is Baupost's motion so I'm going to let Mr. Schwartz take the lead here.

THE COURT: Okay. I'm wondering if I should say your motion to quash is denied now or after you make your opening remarks. I'm not inclined to grant your motion.

And I think we can accelerate this process greatly by my noting that I see no substantial grounds for the position you've taken.

MR. SCHWARTZ: Your Honor, if I could have a minute or two of your time.

THE COURT: Yes, I'm letting you know right now that you're climbing a cliff and you don't have the proper equipment.

MR. SCHWARTZ: That's fine, Your Honor, I'll find a rock booster if I can.

The subpoena has been narrowed greatly. First of all it shouldn't be under Rule 2004 anymore, it should be under 26. The debtors have just yesterday filed their motion to be allowed to file their adversary proceeding

under seal.

THE COURT: I know that's about to be filed.

MR. SCHWARTZ: Your Honor, what this motion has been narrowed down to is their request for Baupost to collect all of its documents post acquisition of rights in the claims, go through those documents, find which documents relate to the amended claim that the Giants put in in December, and then go through those documents, categorize them, all in a privilege log, because nowhere in their motion do they contest that all of these documents are covered by work product and privilege.

THE COURT: How on earth do we know that really? Why should I accept your bald assertion that all the documents are in fact work product or otherwise privileged unless and until you've actually done the work to search it out? I refuse to accept that bald assertion and so you can't make that as part of your argument.

MR. SCHWARTZ: Your Honor, I would just say two things.

First of all this is the exact same assertion and position that the debtors have taken with regards to all of their post bankruptcy valuation documents.

THE COURT: In that case it may come back to bite them.

MR. SCHWARTZ: Okay, Your Honor, as long as

there's -- as long as there's sort of an even hand in this across the parties I would understand the Court's position on it.

They haven't contested at all that these documents are all done in the midst of a litigation. They're all under the supervision of attorneys and they're all for purposes of valuation, which is classic attorney work product, Your Honor. The cases are fairly clear on that.

We've heard absolutely no objection from the debtors to that analysis of the law. All they've said is we want that massive privilege log, but these documents should be prima facie protected by the attorney work product, and it shouldn't be -- it shouldn't be the situation where parties in the midst of litigation have a continuing obligation to just put on a privilege log every single time a new email is generated or a new document is generated for the purposes of valuing their claims, you know, and turn that over to the other side. I mean it seems sort of the classic definition of a harassing subpoena to us.

THE COURT: Well, I don't know that there is a classic definition of a harassing subpoena in the context of a valuation dispute in which a claim jumps from approximately 300 million to approximately 600 million.

And to the extent that your client has knowledge concerning that valuation shift I think you should be

turning over whatever you have that's non-privileged with respect to that.

And since I reject the notion that every single scrap of paper associated with the subpoena necessarily is privileged and that all this exercise would include would be creation of a voluminous and burdensome privilege log, I reject the notion that you can come in and prevail with respect to a motion to quash the subpoena.

Now there may be some other issues here unrelated to your motion to quash, including what's sauce for the goose being sauce for the gander in terms of issues of discovery and relative privilege, but that's to be discussed during compliance, not at a time when you're seeking what amounts to a preemptive bar to 2004 discovery.

There's another related question, which is whether 2004 discovery will continue after the commencement of the Giant Stadium litigation.

My recollection of the discovery protocol is that discovery which has been initiated before the commencement of litigation continues unabated. I can be corrected, but that's my recollection of it.

MR. SCHWARTZ: I think that's correct, Your Honor, and I think with moving into the adversary proceedings if Your Honor recalls the reason you allowed Giant Stadium to take rule 2004 discovery of the debtors, as Your Honor was

highly skeptical that this claim would not be objected to or that debtors would not be filing an adversary proceeding.

THE COURT: I remember, it was about a year ago. I also remember that the Giant Stadium litigation is particularly notable in the portfolio of Lehman-related litigation for being the most facetious in terms of discovery, and so you walk into that particular buzz saw. You are simply adding fuel to that fire, and that's why you're losing.

MR. SCHWARTZ: Understood, Your Honor. We will probably be making a motion to compel the debtors to produce the similar privilege log that we will be producing to them.

THE COURT: You can predict whatever motion practice you wish to predict and you can either do it or not do it, I don't care.

MR. SCHWARTZ: Thank you, Your Honor. Thank you for your time.

THE COURT: Mr. Slack, what do you have to say for yourself?

MR. SLACK: Not a lot, Your Honor.

What I would like to say is that I think when the issue comes up the position of the debtors here is that we have produced valuations and -- that are not privileged. So they have valuations from the debtors.

There are certain valuations that we have that are

privileged that were done in connection with the bankruptcy, and I think that at the time what you will see, Your Honor, is that our point on work product is that work product has to be done solely for the litigation.

What Giant Stadium did was they did calculations that were required, as Your Honor knows, under the swap agreements and those -- you can't cloak those with privilege just because they then become part of a proof of claim, which is what they want to do.

And so what I think you're going to see, Your Honor, is there are some stark differences between the way Baupost and Giant Stadium has acted and the debtors have acted here when the appropriate time comes.

THE COURT: Okay. Mr. Slack, before you sit down, what happens to this discovery after commencement of the adversary, which is I guess we're within hours or days of the commencement of your adversary? How does this current motion practice play into a reasonable discovery protocol for that litigation?

MR. SLACK: Your Honor, I think what the parties have essentially intended with the protocol is that we've collected I think the vast majority of the documents on both sides. As Your Honor knows you gave Giant Stadium the opportunity to take 2004 discovery and the debtors have produced more than 400,000 pages of documents. So there's

been an exchange of most of the information.

I think that the 2004 discovery that's outstanding is simply documents at this point, which are going to have to be collected anyhow in connection with the litigation.

So I think what our position is, is that the subpoenas out there should continue rather than issuing new subpoenas and starting anew.

And as for the depositions I think both sides have agreed to meet and confer once the adversary is filed in the next hours or days and work out a discovery schedule for depositions in the remainder of the case, and I'm optimistic that we'll be able to do that.

THE COURT: Okay. I know that there was a failed mediation. Does the exchange of documents that you've referred to make it anymore likely that if the parties were to renew their efforts to work this out consensually before incurring significant additional expense, is there any prospect that that might be productive?

MR. SLACK: I'm not sure I know how to answer that other than to say that unlike, you know, some counterparties there, because Baupost is well known to the estate and has a number of connections so to speak because of their holdings as a creditor, I think there are lines of communications that are open.

So what I can tell you is, is that we are happy to

reach out and see if there is any -- after we file the complaint -- any renewed interest in resolving it. And if there is on the other side, you know, we will be willing to do that as well.

THE COURT: Okay. Fine. You can submit an appropriate order.

MR. SLACK: Thank you, Your Honor. Can I be excused, Your Honor?

THE COURT: Yes, everybody who's associated with this matter can be excused.

MR. PEREZ: Good morning, Your Honor, Alfredo Perez.

I believe the next matter is the status conference on Lehman Brothers Australia.

THE COURT: Good morning.

MR. GETTLEMAN: Good morning, Your Honor, Jeffrey Gettleman representing the liquidators of Lehman Brothers Australia.

Your Honor, before I present the status report one of the liquidators happens to be in the courtroom today, I'd like your permission to introduce him to you.

THE COURT: I'd be very pleased to have him come forward.

MR. GETTLEMAN: Mr. Marcus Ayres.

MR. AYRES: Good morning, Your Honor.

THE COURT: Welcome to Bowling Green. He didn't come here just to hear you make the status report I hope.

MR. GETTLEMAN: No, although that would have been appropriate, but --

THE COURT: I'm not saying it would have been inappropriate, it's just that I did read it on the docket already. But welcome to -- welcome to New York.

And I should also note that I have met Justice Peter Jacobson in Sidney, Australia informally, unrelated to anything that has gone on in the Lehman Brothers Australia case other than an issue of cross border communication that occurred several years ago.

MR. GETTLEMAN: Your Honor, we gave our previous status report about exactly a year ago, so we felt it was appropriate to update the Court on what's been going on.

So as you know we submitted a written status report and I won't repeat everything that's in the report, but I'll hit highlights, which are basically that one of the -- well, the principal reason why this Chapter 15 case was filed was to protect proceeds of certain U.S. insurance policies.

The liquidators have reached a settlement with those insures. Your Honor granted a motion approving the settlement last March.

And so earlier this year, the first half of the

year was spent in formulating a plan, because the condition of the settlement -- one of the conditions -- was that the Lehman Brothers Australia and the creditors, who would have been beneficiaries under these policies, grant releases, which could only be done, in the liquidator's opinion, through a scheme of arrangement.

So they proposed a comprehensive scheme, which would have wrapped up basically the entire matter, and there were votes scheduled -- the creditors' vote was scheduled. At the last minute there was a change of hands of one of the claims and that claimant happened to have a blocking position. And so the liquidators ended up withdrawing that scheme. But the point was that they still had to provide these releases.

And so what they did is propose formulated and proposed the narrower scheme, which would basically just involve these insurance proceeds.

So instead of resolving everything what they basically did is propose the scheme where the only scheme creditors would have been again these beneficiaries of the insurance policies.

So the scheme, this narrower scheme was put to a creditor vote last week, the creditors unanimously approved it.

The next event to happen is there'll be a court

hearing on October 31st and Justice Jacobson will hopefully approve the scheme, and then the liquidation will continue as far as the rest of the matters that Lehman Australia has.

The only other thing that I can report, which wasn't in my status report because it hadn't happened yet, was one of the main reasons that Mr. Ayres was here this week was so we could sit down again with the Lehman U.S. parties and try to resolve the handful of remaining issues that we have open between us.

I'm happy to report that we had a productive meeting and we had discussed the possibility of basically submitting all four of the remaining issues to a mediation, and so that's what we'll be working on going forward, Your Honor.

THE COURT: Sounds promising, and appreciate the report.

And to the extent that your client will be in Federal Court in Sydney at some point in the near term please extend my warm personal regards to Justice Peter Jacobson.

MR. GETTLEMAN: Thank you, Your Honor.

THE COURT: Thank you.

MR. PEREZ: Your Honor, the next matter LBHI versus Citibank.

(Pause)

THE COURT: Good morning.

MR. KIRPALANI: Good morning, Your Honor, for the record Sushell Kirpalani of Quinn Emanuel Urquhart & Sullivan speaking for efficiency sake on behalf of the Lehman estates, and technically we're here as counsel to the committee, but we're working on behalf of both fiduciaries, Your Honor.

It's been a long time since I had the pleasure of appearing before the Court in this case, and I hope Your Honor understands that I've become reengaged recently with the hope of resolving some of the big last disputes.

With me in the courtroom are my colleagues from Quinn Emanuel, but also Mr. Matt Cantor (ph), head of legal affairs and a member of the board of reorganized Lehman.

We actually took the morning off from tending to another matter, but we'll be going back to that mediation after court, Your Honor, and we are here today to express our sincere wish that we can bring this as well as other matters to a close. We're very focused on trying to resolve and not litigate remaining big issues.

Frankly we had hoped -- I had hoped over a month ago that we might be here on a motion to approve an interim pragmatic solution to deal with an interesting, unique situation where Citibank is holding $2 billion of cash and saying that it doesn't have the ability to use it.

So we're here today on Lehman's motion to permit Citibank to take the $2 billion it has been holding and to make some productive use of it thereby cutting off any arguments concerning additional post-petition interest.

In opposition Citibank set up a fiction, namely that a creditor has an absolute right to sleep peacefully at night with an unconditionally allowed claim and a full release of any counterclaims or else he can assert post-petition interest as a secured creditor by right of setoff.

If Citi were right in that fiction then every creditor who is owed money by an estate who's also sued by the estate would be a secured creditor and be able to charge post-petition interest until he gets a release. That can't be right.

Sure you can imagine numerous situations, Your Honor, where a claim objection results in the secured creditor charging post-petition interest until he actually gets the money. That would compensate the creditor for being without access to the funds.

Where a secured creditor is owed money and not given the money it would be unfair to let the debtors keep it, use it while the creditor is stuck waiting.

And even if he has a lien on property he wouldn't be permitted to liquidate that collateral and use those proceeds either. He's just stuck between a rock and a hard

place and 506(b) fills in that injustice.

So the Bankruptcy Code gives him compensation for that, but neither of those situations actually apply to this unique situation for Citibank.

Your Honor, can I just approach, I want to give you one piece of paper? Is that --

THE COURT: That's fine.

MR. KIRPALANI: Okay.

THE COURT: Thank you.

MR. KIRPALANI: Your Honor, this is Citibank's account statement, which we get one of these every month. You can see it, it says this one is from June 28th, 2013, it's got a QSIP, a security ID with a certain number, it says in the issue name dollars on deposit cash account, and then a couple of places over it says where it's held, at the Citibank vault. Okay? Two billion plus is in there.

Your Honor may recall that in April 2009 there was a stipulation where Citi was required to hold Lehman's cash in a custodial account. This statement in fact shows us, or so we thought until we saw their opposition to this motion, that the funds were sitting in the vault and really just wasting away, just sitting there. But the estate could not use that money or distribute it to its creditors obviously because we're probably not got for the money if we wound up losing our litigation.

So it was basically held hostage to a variety of over inflated claims by Citi, so Citi was not going to let that money go.

When Lehman emerged from bankruptcy there was a significant change of the guard at Lehman. The main event affording a consensual global Chapter 11 plan was accomplished and the estates had been trying to wind down and clean up the affairs.

Now various seasoned bankruptcy veterans joined the board, assumed positions of leadership within Lehman, and they asked what could be done to insure that estate assets were not just wasting away somewhere?

So we thought cash in a vault at Citibank that just sits there while Citi's, we believe, inflated claims are resolved seems to be a poor use of $2 billion.

So we then understood that Citi is asserting, despite the fact that their claims exceeded $2 billion, that they may be over secured if we succeed in knocking down their claims. So that doesn't make sense either.

But we were never told whether Citibank was using the cash or not, so the board told us at a minimum make sure they start using it now so we can cut off any interest arbitrage they may be playing, because we earn 0.02 percent interest, and they are asserting who knows something 7 percent plus in post-petition interest.

So we asked them to take the cash and we'll just sue them like any counterclaim defendant. They said no, they preferred to assert a right to post-petition interest for the next year and a half while we litigate the right amount of their very complicated claims.

Of course if they're right in the way they assert their claims they'd get no post-petition interest because they'd be under secured.

But the trick is if we are right and their claims are overstated then Citi laughs all the way to their own vault.

So we filed this motion seeking to pay them down but to reserve our rights to sue them if they were wrongly holding our money all this time. We'll take the credit risk that Citi is good for the money.

THE COURT: I think that's a good credit risk.

MR. KIRPALANI: Okay. We expected them to say frankly as JPMorgan --

THE COURT: I hope it's a good credit risk.

MR. KIRPALANI: We expected them to say as JPMorgan did, Your Honor, that yeah, that probably makes sense.

It's not perfect, we're not saying this is the perfect solution for them either, but it just makes sense and it's equitable. They can invest the money. We thought

they'd say, okay, we'll invest the money and there's no point in holding that amount of cash in the vault.

But then look what they actually say in their opposition of this motion, which frankly was a surprise to everybody at Lehman. Not only -- especially in light of the one page I gave Your Honor.

Not only do they admit that they want the interest rate arbitrage, because Lehman deserves punishment for spending all of its energy on global issues these past few years rather than caring about Citibank's entitlement to get paid, but this is really quite shocking, that there's no money in the vault at all.

But what did they do with the cash? They say they never sought to lift the automatic stay, they say they never sought permission to setoff, but what did they do that we don't know, it's really of no moment, we don't think, but we think they took the cash, they put down their marker instead, and they've enjoyed the use of the cash probably since April 2009 since that stipulation.

And so that's why they come to court now and they say giving us the cash does nothing for it, it serves us no benefit, because they've already been enjoying that benefit.

And they submit some affidavit, Your Honor, which I don't think we're going to be getting into in detail, saying that there's a bunch of accounting rules that I don't

think have any place in this courtroom about how a creditor accounts for its risks and reserves, and frankly that's up to each creditor. Every creditor that's sued by an estate has to deal with taking reserves against what they think is appropriate and what they think management believes is reasonable.

But what they're saying in essence is we don't get anything by exchanging our we're holding your money hostage setoff right for a pay down because we already treat the money as our own and we do with it as we please. And that was news when we read the affidavit.

But until and unless you release us from potential claims they say or give us a peaceful night sleep they say we will assert we are owed post-petition interest and that's going cost you at least $400,000 a day.

This is inequitable to the creditors of Lehman, Your Honor, so we request -- we respectfully request that our motion be granted.

I'd like to just touch briefly on the -- some of the points in the motion, I know Your Honor and I know your staff has reviewed our authorities, but I'm going to be perfectly blunt and frank, Your Honor, there are no significant controlling -- certainly no controlling authorities, and there really aren't that many significant authorities for this fact pattern.

Calpine we do think --

THE COURT: Can I break in no a second --

MR. KIRPALANI: Uh-huh.

THE COURT: -- because I have looked at the Calpine order from 2006 and the Calpine transcript attached to your most recently filed papers, and I'm also generally familiar, although it's certainly not an authority, it's just my experience as a mediator in another major case which is currently pending in this district, where issues relating to the pay down of significant cash owed to a creditor constituency represented one possible way to deal with a claim for post-petition interest.

And so I'm not talking in code for purposes of the transcript, I'm referring to the Rescap bankruptcy case and the current dispute with holders of junior secured notes. That matter is currently on trial before Judge Glenn.

And so I recognize that there is a convention –- I wouldn't call it precedent, in major bankruptcy cases for parties in interest, especially unsecured creditors, to make the business judgment, together with the trustee or debtor in possession, to pay down undisputed secured obligations so as to stop the running of interest that may be ticking away at significantly high rates thereby making the pay down a prudent business judgment.

The situation we're in now is probably

unprecedented in that it's about five years after the posting of $2 billion in cash collateral that I understand was placed in a Nassau branch of Citi, I don't know what happened to that cash thereafter, I don't know that I need to know that for these purposes, but Mr. Shimshak, if he wishes, can tell me about it.

And I am reminded of other comparable situations in this case, some of which have ripened into litigation or some of which have ripened into stipulations.

One comparable situation involved JPMorgan Chase, a stipulation relating to the treatment of their claim.

Another comparable situation involves Bank of America where we had litigation over the posting of half a billion dollars in an account in the Cayman Islands and a determination that I made that there was a stay violation in offsetting those funds.

I don't know to what extent there are any reserved rights on the part of the estate in reference to what Citi has done with the $2 billion, and I'm not predicting nor suggesting that anything needs to be done, but I recognize the possibility that certain claims might be made.

So with that background, recognizing that there is authority that can be looked to by analogy, I think we're probably dealing with a unprecedented set of facts.

MR. KIRPALANI: I agree with that, Your Honor.

And I want to just address one legal issue and then I think I'll sit down and Your Honor can hear what the opposition is. It's the 105(a) argument. I actually argued the New England Dairies case in the Second Circuit, it's my rare opportunities to do that.

New England Dairies doesn't say that 105(a) doesn't have any import. What it says is it's supposed to fix the play and the joints. It can't stand alone. It needs to be coupled with something.

So I'm sure Mr. Shimshak is going to attack us on what's it's coupled with. He'll say Section 363 doesn't apply, he'll say we're post-confirmation, he'll say we're post-effective, he'll say there's no estate, he'll say all of those things, but the one thing he can't say is that 502 still applies.

And I think as Your Honor knows -- and I know Your Honor does -- if Your Honor looks at 502 in its totality there's a lot of play in the joints.

There's a 502(c) play in the joins, and this isn't contingent or unliquidated, it's a disputed claim, and I can't really creditably argue, I did think at it, of this is going to unduly delay the administration of the estate because that's a bit of a stretch, we are past confirmation and we have gone effective, so I didn't want to pursue that line.

502(j) is another one. You can allow a claim, Your Honor can, and then subject to reconsideration of it later.

And we looked at the case law there and it wasn't favorable, because in order to reconsider I'd have to show what you usually show for reconsideration type of things.

But I don't think that means that 105(a) does not provide authority combined with 502 to fix the play in the joints from this really unprecedented and unique situation.

So that's what we'll submit, Your Honor, as our statutory basis.

I agree with the Court that there is no actual precedent for this and it was not an easy motion to us to bring on, but we do have a constituency. Shame on us, shame on me if we didn't think of it years ago, but we do have a constituency that is continuing to suffer and we have to do something about it at some point and so the some point is now.

THE COURT: I wasn't ever thinking shame on you or shame on your colleagues, but I'll admit I was thinking what took so long?

MR. KIRPALANI: Yeah, you know, Your Honor, I don't have a good answer. Don't have a good answer.

THE COURT: Okay.

MR. KIRPALANI: Thank you.

MR. SHIMSHAK: Good morning.

THE COURT: Good morning.

MR. SHIMSHAK: I may need this periodically because I'm getting over a cold, so.

THE COURT: It's very nice, it's like an ad for Avian Water.

MR. SHIMSHAK: Before I get started we'd like to engage in a little housekeeping.

We have prepared some demonstratives for the Argument, which I would like to hand up to you.

MR. KIRPALANI: Now we know where the money in the vault is going.

THE COURT: Okay. At least we're not dealing with projection equipment.

MR. SHIMSHAK: We'll get to that in a moment.

I'd also like to introduce my colleague, Claudia Hammerman. For purposes of the argument today we've divided it. I will address the relief requested, the basis for the relief requested, and the many ways that the relief requested violates the terms of Lehman's plan.
Ms. Hammerman, who has been living with the case for five years and living with the adversary proceeding for over 20 months, will address any questions that the Court may have about this history and about the derivative claims and interest rates and things of that sort, but she's going to

be focusing primarily on the equitable arguments that are made, to the extent those are relevant for the Court's consideration.

THE COURT: That's fine. I'm going to ask you an impertinent question to start.

MR. SHIMSHAK: Of course.

THE COURT: You were expecting it.

MR. SHIMSHAK: No, but go ahead.

THE COURT: Okay. It's been five years, more than five years actually since Citibank and other big banks deemed themselves insecure in the period leading up to Lehman's bankruptcy filing and exercised self-help remedies.

It's now many years later, we have a confirmed plan, we have late term litigation involving JPMorgan Chase, we have most of the other big banks that were involved in major derivative disputes that have settled with this estate, and Citibank is conspicuous in being an outlier in terms of now saying yes to anything.

My question is this. I'm certainly prepared to make a ruling that's courageous that will be disadvantageous to you, and I think you come in knowing that that's at least a possibility, notwithstanding the fact that we're dealing with an unprecedented set of facts and circumstances, and Mr. Kirpalani acknowledged that during our discussion.

But why can't you and the estate reach an

agreement comparable to an agreement that was reached in 2009 with JPMorgan Chase regarding what amounts to provisional allowance of a claim with all rights reserved?

MR. SHIMSHAK: Let me speak to that and this gets into what I would say -- and I don't mean this critically -- the mischaracterization of the legal relationship between the parties as it relates to the deposit and when that the properly understood you will understand that the relief that they're offering us is completely illusory and confers no benefit on us whatsoever.

So while I can't speak to what JPMorgan was thinking, I do know that there were evident -- evident in the record and evident in the pleadings in connection with that matter benefits associated with the relief they were getting.

Specifically they were being relieved of the burden of managing securities and the risk that they would be accused of mismanaging those securities. So they were relieved of another potential liability. They were given over $500 million of cash rather than having to liquidate and realize on those securities.

So that transaction had its own independent motivations. It's completely different from the situation that we find ourself in properly understood.

So let me elaborate on what I mean and let's start

because I think when we're talking about deposit accounts and we're talking about setoff rights we have to be very precise in understanding this problem and understanding the relationships of the parties -- and the starting point is the deposit account itself. I

On -- on June 12th --

THE COURT: But before you get into --

MR. SHIMSHAK: Uh-huh.

THE COURT: -- your -- your main argument --

MR. SHIMSHAK: Uh-huh.

THE COURT: -- recognizing that we're not making a direct comparison between this situation and the JPMorgan Chase situation from 2009, are you telling me that you are incapable of working out some kind of consensual arrangement with the estate that avoids a coercive outcome that I create for you?

MR. SHIMSHAK: Incapable, I can't say incapable, you have to be able to negotiate. If there was -- if there was a -- if there was a solution that was fully protective of our rights of course we're prepared to entertain that and to negotiate that.

THE COURT: Okay.

MR. SHIMSHAK: The proposal that's been made is not that proposal.

So let's start with the $2 billion deposit which

was created in June of 2008. That deposit has always been and always will be nothing more than a debt that we owe Lehman. We have owed Lehman $2 billion absent anything else since June 12th, 2008 when that deposit was created.

And the nature of a deposit account is the first tab, Your Honor. This has been recognized at the Supreme Court level in the Strouth (ph) decision which dealt with the application of the administrative freeze. It's the leading case on the administrative freeze. And that case states that no matter how people think of it, no matter how you and I think of putting money in the bank and having cash in the bank, in fact a deposit account is nothing more than a debt that the bank owes to the depositor.

So when you start with that proposition that we've owed them a debt you then move to what our claims are against that debt. And what we claim are offsetting rights.

In other words, we say we have claims that enable us to say to Lehman we owe you $2 billion but we don't have to pay it. We owe you $2 billion but you can't instruct us what to do in respect of that debt until the issues of our offsetting claims are resolved. And the Bankruptcy Code cannot be clearer on that.

Section 542(b) makes clear that we don't have to turn over, to the extent we assert rights of setoff, and Section 553 fully protects rights of setoff from any other

provision of the Bankruptcy Code.

So when you think of this situation in its correct substantive terms that we owe them a debt, but we are saying we don't have to pay it, the proposal that they're making immediately becomes illusory and of absolutely no benefit to Citi.

Because here's what they're saying. That debt you owe us we'll step back and we'll say we're not going to characterize it anymore as a special versus general account, and those claims you're asserting against the account you are free to offset them. Because that's all we can do. We don't get money, we only reduce our own exposure to the extent of our offsetting claims.

But when they tell us to provisionally allow the claims and exercise the right of offset and couple that with their preservation of rights provision they are saying the following things. That simultaneously you no longer owe us the debt, but you continue to owe us the debt. You can reduce the debt, but you can't reduce the debt. Your claims are valid for purposes of reducing the debt, but your claims are still in dispute for purposes of reducing the debt. That gives us absolutely nothing. It confers no benefit on us whatsoever and it takes away from us our protected rights under section 506(b) and under the bankruptcy -- under the plan and other provisions of the Bankruptcy Code to recover

post-petition interest and post-confirmation interest to the extent we don't think they will, but to the extent Lehman succeeds in dramatically reducing our claims.

The notion of a litigation arbitrage as they call it is really a quarrel with Congress about the ability of an unsecured creditor to have the benefit of -- excuse me -- an oversecured creditor to have the benefit of excess collateral.

But -- so that is why the provision is completely illusory, it's offering us nothing.

THE COURT: But I hear your argument. The argument assumes to some extent the existence of a fund doesn't it?

MR. SHIMSHAK: No, it assumes the existence of a debt.

THE COURT: Well, I know your argument is that this is just a deposit account so you have an obligation ultimately to pay over the $2 billion that was deposited with you subject to offset.

MR. SHIMSHAK: It's more than an argument. That is the reality of the relationships between the parties.

They gave us $2 billion, we maintained in the litigation this was a general deposit. They argue only that it was a special deposit for limited purposes. That issue will be resolved in the adversary proceeding.

THE COURT: Isn't that very similar to the issue that was litigated in the Bank of America case?

MR. SHIMSHAK: The -- there are similarities between those -- between those two cases, yes, but we believe on all the points of comparison with that litigation our position is much, much stronger than Bank of America's in litigating that with you. That boiled down -- before you -- that boiled down to issues about how that arrangement went into place and the construction of the operative documents between the parties.

THE COURT: Understood. But one of the things that I'm concerned about, just so I understand your argument, is what happened to this money? It's debtor money which is deposited with Citibank and it ends up, as I understand it, in an offshore account, correct?

MR. SHIMSHAK: No, well this --

THE COURT: Was there not an offshore account here?

MR. SHIMSHAK: No, there was originally a Bahamian account, but I'm sorry to interrupt the Court, but I want to be clear about this because this is very fundamental to what banking is.

When someone makes a deposit they give the bank the money. The money doesn't -- the money doesn't sit in a box in the bank, whether it's in the Bahamas, whether it's

in New York, whether it's in Switzerland, where it's any place else. They give the bank the money, and in exchange they're saying I will take your credit risk and I will take an interest factor on that. The bank then goes, uses the money, does whatever it wants to do. It still has that debt to the creditor -- to the depositor, and it has an obligation to pay interest if the account carries an interest feature. But that other money belongs to the bank. That was the essence of the contract that was made at the time of the deposit.

So there's not dollars sitting around that represent the deposit, it is only an obligation of the bank that is owed to that depositor.

THE COURT: Okay. But in the ordinary course of being a secured creditor you're able to look to an identified asset and claim a security interest in that asset. That's one of the reasons why in lending cash collateral accounts are set up, why possession is such an important part of the notion of a security interest.

And my understanding is that this money has basically filtered into the Citibank system and there is no identified deposit account.

MR. SHIMSHAK: There --

THE COURT: At this point.

MR. SHIMSHAK: No, what has happened -- what

happened was that the movie -- excuse me -- the money was moved to New York and then by agreement a separate account arrangement was opened up with Lehman. But those are just different book entries. That's not -- that's not a box of $2 billion --

THE COURT: I understand.

MR. SHIMSHAK: -- moving from one place to another.

THE COURT: I understand that we're not talking about a box with $2 billion in it. It would be interesting to actually observe such a box some day, but --

MR. SHIMSHAK: Your Honor, I'd like to make one other point too, because in many ways issues -- issues concerning setoff, because setoff is treated as a secured claim under the Bankruptcy Code, there's no question of that, it's expressed in Section 506, but the issues are unique when one thinks of it, and you cannot start analogizes to your traditional understandings of collateral in the sense of having property of the debtor.

When the property of the debtor is an obligation that is owed to the debtor it's basically a receivable and you're talking about what defenses you have, that's what setoff is, defenses to the payment of that receivable. That again goes to what is fundamentally flawed and illusory about this relief.

Because they're saying to us pay yourself, which they can't do any way, we're not obligated to follow their instructions, they're saying all right we'll step back from the $2 billion deposit and surrender it to you, but that has only one meaning in this circumstance given the relationship between the parties. We are free to reduce the payment obligation to Lehman by our claims, but they are simultaneously saying without interruption your obligation to pay us that same $2 billion and your ability to reduce it by your claims remains in dispute.

So nothing from our perspective has been accomplished. There's been no benefit to us of this arrangement, there's only been the curtailment of existing rights.

THE COURT: Well, one of the existing rights that you assert and insist on preserving is the right to claim post-petition interest, and this is mostly about that I think. This is mostly about your insistence upon being able to assert an interest claim that is significantly burdensome to the estate and its creditors, because as it clicks away at seven and a half percent or whatever the right number is --

MR. SHIMSHAK: That's not the right number, but --

THE COURT: Well, what is the right number?

MR. SHIMSHAK: The right number for the cost of

funds by analogy to another situation, and I'm straying into Ms. Hammerman's area right now, is under five --

THE COURT: It's okay. Just because --

MR. SHIMSHAK: -- under five --

THE COURT: Just because you wanted to --

MR. SHIMSHAK: Under five percent.

THE COURT: -- set a neat division doesn't mean that I did.

MR. SHIMSHAK: No, but it's -- this is the kind of that lawyers do.

Lehman has been out there insisting on a 14 percent rate in -- for its own derivative-related claims. We made -- we made the mistake in retrospect of saying the rate we are seeking is less than half of what they are seeking. So they immediately tag us with seeking seven percent. But in fact the rate is below five percent.

Now, on the post-petition interest point let me address that. Here's the dynamic. We think our claims are -- exceed the $2 billion deposit and in that case we'd exhaust it, there wouldn't -- there wouldn't be an issue of post-petition interest.

Lehman is focused on a very narrow situation. Lehman maintains that we have grossly inflated our claims, that we're dragging our feet in the litigation, and you know, a bunch of stuff related to the process and the

dynamic that we're involved in now. And they're saying to themselves if we're wildly successful and we were right and we push Citi's claims way down it's a pyrrhic victory because they're an oversecured creditor at that point as a result of our reducing their claims and they're therefore going to make a claim for post-petition interest at whatever rate they're going to make that claim. And they're dissatisfied with that result.

I have two responses to that.

The first response is that is a normal incident of the claims allowance process. Parties assert claims, they have claims reduced, and if they have additional protection and collateral or an additional right of setoff that right is recognized. It's not -- it should not be punitive that as a result of the claims allowance process and you find yourself with the smaller claim but more protection you're able to recover post-petition interest. That shouldn't be taken away from you.

But to the extent there is an element of fault or wrong doing that Lehman is asserting, that it's really bothered by this potential, they've already protected themselves against that possibility.

Their adversary proceeding complaint contains allegations that we inflated our derivative claims, that the inflated derivative claims have been harmful to the estate,

and they seek the remedy of equitable subordination.

So there is the remedy in that circumstance if they're considered -- if they can prove up the equitable subordination standards. There is the remedy if we've engaged in any kind of misconduct.

But it should not be cutting off our statutorily created rights and our rights reserved under the plan in a circumstance of us finding ourselves with derivative claims that are less than we believe them to be but sufficient to offset in combination with interest our payment obligation. That's a protected right. That's not -- that's not something that can be taken away from a creditor.

THE COURT: Okay.

MR. SHIMSHAK: Now, Mr. Kirpalani was right when he said I was going to get up in addition to talking about the nature of the relief -- relief sought. And by the way, I want to make one other point, because this goes to the dynamic between the parties in your talking to us about whether something could be worked out.

When this motion was filed -- when this concept was introduced we said to Lehman, please explain to us how we're getting any benefit out of this? We never got an explanation.

As the situation advanced we then said to Lehman, not only does what you're saying make no sense, it's

internally inconsistent that you can both dispute and allow a claim, you can both owe and not owe a debt. Not only does that make any common sense, as a matter of accounting, and we included the last exhibit in here, the relevant account standard, this setoff can't be taken. You can't make a bank take a setoff and then tell the bank that it still owes the debt and that the claims that it used to offset are still in dispute. It just can't be done under the applicable accounting standard.

We asked Lehman, please, tell us if we're wrong about this accounting treatment, -- if we're wrong about this accounting treatment please explain to us why we're wrong.

We also said to them, we will make our accounting personnel available for a deposition. You can take their deposition, you can hear from -- they'll educate you about why what you're saying as an accounting matter is impermissible. They refused to take the deposition.

They then in their response say this accounting issue is a Citi specific issue, which is itself an accounting conclusion by the way, an unsubstantiated accounting conclusion.

And they then go on to say -- they cite some cases which have nothing to do with the application of the generally accepted accounting principals on the FAZBI (ph)

provisions that we've identified to them.

So it's a complete -- it's a complete nonsense from the standpoint of its internal contradictions and an accounting impossibility.

But putting all of that aside they have to have -- they have to come to you for authority to impose this on us and they have to have a statutory basis for it. They have to have a statutory basis for it. They know that.

They talk about four statutes. 363(b). Let's talk about 363(b).

We're not being cute when we say 363(b) no longer applies, all the assets have vested in the debtor, it's no longer property of the estate. That's a provision of their own plan. Section 13.1 of their own plan says that.

And when I saw Lehman's response I was really curious, I was thinking why is Lehman taking the position that Section 363(b) still applies for non-ordinary course transactions? Why would a debtor with a confirmed plan ever want to be out there in the world dealing with third parties now and having them uncertain as to whether or not there was a need to run back to Your Honor to get approval for something? It made no sense.

So we went to the docket. And Your Honor is intimately familiar with the Archstone transaction. Can someone help me? What tab is that?

MS. HAMMERMAN: It's 6.

MR. SHIMSHAK: Tab 6. Your Honor, look at tab 6 of -- no, no, that's not tab 6. Yeah, look at tab 6 of your materials.

As you recall there was an issue concerning the ability to exercise a right of first out offer regarding certain securities of Archstone, and that issue emerged in the period between confirmation of the plan and the effective date.

And what was Lehman's position on that? Well, as you can see from the highlighted language the plan has not yet gone effective. Consequently the debtors are continuing to operate as debtors in possession as to which court-approval is required for transactions out of the ordinary course.

Then a footnote, “The debtors reserve the right to withdraw the motion if the plan effective date occurs prior to the hearing on this motion.”

So clearly at that time Lehman was recognizing two things. The need for 363(b) approval in this gap period as to transactions outside the ordinarily course, and recognizing under the terms of their own plan in 13.1 that when the effective date occurred that was not going to be necessary.

But -- so this matter is the first instance to my

knowledge.

THE COURT: I think you're overstating it. It's a reserved right. It's not an acknowledgment of legal position.

MR. SHIMSHAK: But this was -- this is the first instance to my knowledge that despite 13.1, which says that all of the property of the estate is vested in the reorganized debtors, it is unqualified, that Lehman has taken the position that somehow 363(b) has continued vitality. I do not -- you know, this is the first instance.

But to see if this marked a change of position as recently as Monday in the next tab in a dispute involving a 2004 examination where the challengers -- where the parties bringing the 2004 examination were questioning actions that the plan administrator had taken under the authority granted him under the plan and seeking to involve the Court in reviewing those actions Lehman responded by saying it's no longer in bankruptcy, it's free to -- free to negotiate and enter into transactions involving its assets free of any restrictions of the Bankruptcy Code or rule -- rules.

So what does Lehman say in response to our argument about 363(b) not being available as a basis for granting them the relief requested?

They simply say a complete non sequitur, well, there are continuing jurisdiction provisions in the case.

The Court has continuing jurisdiction over the adversary proceeding. And therefore what? And therefore Section 363(b) applies? The one doesn't follow from the other. The fact of continuing jurisdiction does not revest or recreate the estate and property of the estate for purposes of invoking section 363(b).

The statement itself is not even legal argument, it's really an ipsi Dickson in which they're just saying, well, see these continuing jurisdiction provisions, that means 363(b) still applies. No it doesn't. It doesn't mean that at all.

502. Let's talk about 502. It's section 502(b).

What does section 502(b) actually say? Section 502(b) says, "Claims somebody allowed unless ..." and then there are enumerated basis for not allowing claims. That is the function of Section 502(b). To allow -- it does not say anything about provisional allowance, it just says the Court shall allow claims unless one of these enumerated conditions occur.

There's nothing in there remotely reassembling the issues that are being presented by this motion.

Section 502(c) deals with estimation. But estimation for what purpose? For purposes of allowance. Not provisional allowance, purposes of allowance so you can get a distribution.

So 502(c) by -- you know, has no application.

There was such a wonderful phrase in their brief. Oh, this is where they're trying to say, you know, they can breathe into Section 502 enough substance for you to do what they're proposing that you do. They have this wonderful phrase in there.

They're asking the Court to exercise its equitable powers within the confines of Section 502(b) to facilitate the estate's reconciliation of the subject claims.

Your Honor, I must have read that 10 times. This will make the eleventh. I still have -- I have no idea what that -- what that phrase means. I have no idea what that phrase means.

502(b) is very clear, it's very clear on what it's purpose is, it's very clear on what it's mechanic is. It has nothing to do with the facilitating the estate's reconciliation of the subject claims.

Their argument for 502(b) -- their argument for 502(b), let's call it what it is. It is a gloss that they want you to impose on the statute. But I -- to allow you to provisionally allow claims when there's nothing in that provision that allows the provisional allowance of claims. It's a gloss that they want to put on 502(b), and I would maintain that it is a gloss that completely obscures and deviates from the stated purpose of the statute.

So in simple terms 363(b) is not available, 502(b) is not available. They refer to 509. 509 is the not a basis for relief, because 509 presumes the outcome. It presumes that claims have been paid and fully satisfied before you can get to 509. So 509 could never have application here because we're never going to be fully paid under the -- by the terms of their own order.

But that doesn't stop them. When you look at the terms of their proposed order -- when you look at the terms of their proposed order they actually say that as a consequence of the provisional allowance they are fully subrogated to our rights.

So that means when we get paid from some other estate because of this provisional allowance of our claim, this nonpayment payment we have to turn the money over to them. That's the effect of that order. That seems to be an enormous overreach. And in fact in trying to get to that overreach they even misconstrue the statute.

We have one of the parties -- one of the parties that owes us money is a Lehman entity that is not a debtor here. Lehman Brothers Commercial Creditor -- Commercial Corp. Asia, it's in a liquidation proceeding in Hong Kong. They owe us -- this is what we refer to as the Hong Kong loan. They owe us about $300 million and Lehman guaranteed that obligation. 509 says, "An entity that is liable with

the debtor is entitled to subrogation." Well LBCCA is not a debtor. Lehman can't assert subrogation rights through Section 509 because of -- for a LBCCA payment. But that's not the way the order reads. That's not the way the order reads.

So the implication of 509 is the a complete overreach.

So let's reprise where we are. The relief makes no sense. It doesn't offer us anything. All this talk about how it's fair, how it's balanced, how we have a benefit. There's no benefit to us. We end up being in the exact same place. We can't do it as an accounting matter, and they have not, despite our invitation, demonstrated that we can. There is no statutory basis for the relief.

363(b) is not available. 502(b) is not available. 509 has nothing to do with it. And 105, which supplements all of them, can't even be invoked if the underlying statutes aren't operative.

But that's not enough. That's not enough. What they propose also violates the terms of their own plan.

Now their argument in response to this was, well, there's nothing in the plan that says we can't provisionally allow claims. Well, all right, those words don't literally appear anywhere in the plan. But certainly -- certainly it's the case, and no one would dispute this, that a Chapter

11 plan is in essence a contract between the debtor and its creditors as to the resolution of the claims. It creates rights. It creates procedural rights and it creates substantive rights. It tells us how we're going to be treated, it tells us how we're going to get finality, and it describes the process under which we will get all of those issues resolved.

What does their plan provide? Their plan provides that they cannot make any payments, make any distributions on claims that are disputed. Our claims are always disputed under this arrangement. Yet they're purporting to make a distribution. Distributions that are made are supposed to be free of all claims, liens, and encumbrances. The distribution that we're getting through this provisional allowance is coming with the entire litigation attached to it. It's by no means a permissible distribution within the plan.

It says that rights of setoff are fully protected. What are the rights of setoff that we're asserting? It's the right to assert the full extent of our claim, including claims for post-petition interest and post-confirmation interest against our payment obligation to Lehman.

This is an attempt to cut back on that right outside of the plan, and I would argue and I maintain in derogation of the plan.

Now, you know, they may say that it's not prohibited by the plan, but every creditor has the right to expect that their conduct is going to be consistent with the plan and it is not going to reduce the rights that are available to us under the plan. But that is the effect of this proposal.

It doesn't work substantively, it doesn't work from an accounting perspective, there's no basis for the relief, and it violates the terms of their own plan. That's why we think this motion is improper, that's why we think it should be denied.

If Lehman wants to continue to discuss with us some arrangement that is protective of our rights under the Bankruptcy Code, under Section 553, and under the plan we're always open to discuss that.

Our questions to them, please explain how this works for us, please explain how this can be done from an accounting perspective. Evidence is our willingness to have a dialogue with them. It's the opposite. They cut off the discussions, they would not respond, they ran into court to get this relief from you. We think it's improper, we think the motion should be denied.

At this point I'm prepared to yield the podium to Ms. Hammerman to talk a little bit about the equities.

THE COURT: Okay. Thank you, Mr. Shimshak.

MS. HAMMERMAN: Your Honor, Claudia Hammerman from Paul, Weiss.

I -- I am the master of the facts, I have been dealing and living with this case for five years and that's why I think Mr. Shimshak ceded this portion of the argument to me. So I'd like to address some of the factual questions that you raised initially with Mr. Shimshak and he bravely tried to counter.

In one question you had is how is this different from B of A? In the B of A situation -- and this is -- this is, you know, way beyond this motion, but I understand you're trying to figure out why this is a different situation from others that you have faced.

In the B of A situation there was an agreement. There was a security agreement that covered a deposit and it limited the definition of indebtedness, and that definition of indebtedness was limited to clearing and was -- and Your Honor found that there was no reservation of common law rights to go broader than clearing.

Now here there is no security agreement covering this deposit. In fact there is no written agreement at all.

This is a deposit in the same way that you and I deposit money in the bank, we all use the colloquial terms that there's money in the bank. In fact there's no money in the bank.

You asked what did Citibank do with this money? Citibank treated this as a general deposit, the same way whenever Lehman had to park its funds at night extra funds to earn interest on them Citi commingled these with its own funds and Citi views itself as having a contract, a debt to pay this back subject to the negotiated rate of interest.

You also asked whether the relief sought here is impossible. And we submit based on consultations with senior accountants at Citibank that it is impossible, and we offered those senior Citibank accountants in the accounting policy group at Citibank, we offered them up for deposition.

Our understanding, and you can look all though the last tab in the binder, our understanding is that even a layperson looking at the conditions for setoff would absolutely see why as a matter of prudent accounting during this hard fought litigation Citi cannot take the setoff.

So Your Honor could I guess -- well, as Mr. Shimshak described, we don't think there's a legal basis for Your Honor to cut off our rights to post-petition interest, we think it's in violation of the plan, but putting those problems aside Your Honor could I guess issue an order that says no interest will accrue on Citibank's claims. But you can't -- and you could say for purposes of this proceeding those have been provisionally satisfied until they're allowed. But Citi would not be able to do

anything with the $2 billion debt it owes and the countervailing debts that Citi says Lehman owes.

Now you asked about another precedent, which was Calpine. And you know that's very interesting, because at the time of the arguments before the -- before the Bankruptcy Court and before the Appellate Court there was no hint that the payments that were being made were disputed payments at the exact time they were being made.

All of the briefing in those cases makes clear that this is a debt that's owed and the reservation of rights -- the reservation of rights are with respect to the make whole.

And the question that was presented is can the judge allow payment of the principal and accrued interest up to that moment but not permit -- but not decide the question of the make whole and whether it also needed to be paid at the same time?

The question of whether those were inextricably intertwined and whether it abridged any rights by permitting payment of one but not the other, that was the -- that was the situation before the Bankruptcy Court and before the Appeals Court.

Now it is absolutely true as Lehman has noted that later on in the bankruptcy proceeding the creditors' committee asked for permission to actually challenge the

secured status of those claims and the debtor opposed that, and the debtor argued that -- and I think we have that at a tab, maybe you can do we the favor, Steve, of telling which tab it is -- but the debtor -- the debtor opposed the motion. The debtor said there is no colorable basis --

MR. SHIMSHAK: Tab 11.

MS. HAMMERMAN: -- to argue --

MR. SHIMSHAK: Tab 11, Claudia.

MS. HAMMERMAN: I'm sorry, tab 11.

The debtor argued that there is no colorable claim that this is not a secured debt. In fact the debtor had always referred to it as first lien debt, so had the UCC in their previous submissions, and the only reservation of rights in their previous submissions both to the Bankruptcy Court and the court of -- and the District Court were with respect to the make whole provision and certain professional fees.

Now --

MR. SHIMSHAK: Oh, tab 10. I'm sorry, tab 10.

MS. HAMMERMAN: Apologies.

MR. SHIMSHAK: My apologies.

MS. HAMMERMAN: It's tab 10.

THE COURT: I enjoyed reading the other tab any way.

MS. HAMMERMAN: Okay.

MR. SHIMSHAK: Thank you, Your Honor.

MS. HAMMERMAN: So in tab 10 you can see that the debtors state that there was no colorable basis.

As things are wont to do in Bankruptcy Court the dispute was settled and by stipulation the authority was granted to the UCC to bring that claim later. But it doesn't change the fact that when Calpine, the decision that they referred to as the basis for what they're seeking here, at the time that was decided there was not a hint that there would be any dispute to the -- to the claims that were being paid with those monies.

So we submit that there is no authority, no analogous situation where claimants would -- I'm sorry -- where the debtors force the creditors to provisionally satisfy a claim that is disputed.

I think there was also discussion with Mr. Shimshak about the rate and what rate applies -- would apply here.

Now we have been accused of charging exorbitant rates, those were the words repeated over and over again in the brief. The highest interest rate that Citi is seeking is under the industry standard is the master agreement, that calls for Citibank's cost of funds plus one percent.

In our opposition we -- we reflected the fact that Lehman itself is seeking post-petition interest or seeking

interest under the selfsame provision. We also noted that there are public reports that the amount that it is seeking is as much as 14 percent. There was no dispute about either of those two statements in the reply papers. But what the in fact the reply papers didn't touch that.

Instead what they looked at, they argued that Citi is seeking at least seven percent and Mr. Kirpalani repeated that before Your Honor.

And we respectfully submit that that is simply disingenuous. It's disingenuous as a matter of mathematics, because what we said in our opposition where they claim to have derived this at least seven percent from our opposition, what we said there was that Citibank's rate of interest or the rate of interest applicable to Citibank as an A-rated financial institution is going to be substantially -- and what's amazing is that actually in their reply papers Lehman quotes this exact language in footnote 39 I believe. They -- what we said is substantially less than half of what Lehman is claiming.

So 14 percent -- substantially less than half of 14 percent is not at least 7 percent.

But the problem that we have with the -- with the claims that have been made with respect to this seven percent go beyond that.

As we stated in our papers, Citi is assiduously

trying to collect from other obligors on the claims that it is making against LBHI.

In one of those proceedings Citi has filed publicly an estimation of its cost of funds over an analogous period. That estimation was 4.65. So it would be 4. -- what Citi would claim it's owed here is it's cost to funds plus would you be percent.

Now Lehman is absolutely familiar with this litigation, they have been following it, and in fact they recently served us with a discovery request asking for all documents produced by either side in that litigation.

So it's not clear what Your Honor will determine Citi's cost to funds is, Citi has estimated it, but the cost to funds plus 1 percent can be no more than 5.6 percent, and Citi would essentially be judicially estopped from estimating it at a higher rate. So we don't think this amount is exorbitant at all.

The other thing that Lehman has suggested, they've suggested that Citi is using the accrual of post-petition interest as leverage and as litigation arbitrage.

Now we find that accusation ironic, because this situation isn't like the situation Your Honor faced where derivative's counterparties to the debtor were making those kind of allegations in connection with the flip clause litigation.

In the flip clause litigation Lehman is seeking interest under this selfsame provision, perhaps as much as 14 percent, they didn't respond to the public report, and they are simultaneously seeking stays -- lengthy stays of that litigation. By our count now they have sought two years worth of stays.

So we can at least sympathize and understand why the derivative's counterparties are saying that that is litigation arbitrage and using the threat of interest as leverage.

Now we will concede that in any litigation – in any litigation at all where interest can be paid that exasserts some amount of leverage on the parties. That just is part of their cost benefit calculus. And that's the situation here.

Citi maintains that by contract under bankruptcy law and under the plan it's entitled to full post-petition interest to the extent of its collateral at the time its claims are allowed. And that is our legal position.

Plaintiffs try to suggest that Citibank could only access that collateral for purposes of post-petition interest if Citi has behaved wrongfully here and has grossly inflated its claim, and that is simply untrue as a matter of fact.

As we stated in our papers Citibank is assiduously

pursuing other sources of recovery here. It has already recovered $200 million on the claims that it is making against LBHI. It stands to recover hundreds of millions of dollars more.

Moreover, we have pointed to other sources of collateral that Citi faces with respect to these claims. And Citi has unsecured claims against LBSF and the underlying debtors here.

So it is simply not the case that Citibank will only have post-petition interest if Citi has wrongfully, grossly inflated its claim.

In fact right now if Citibank recovers everything, every penny of the claim that it is seeking there would still be substantial room for post-petition interest through 2014.

Now is Citibank using this as leverage? I think the -- our position is that the law has given us this right. This right exists and it should -- you know, it will be part of the calculus that debtors have to make as to whether they want to make a reasonable offer in terms of settling this dispute.

And we would -- we would also note that the --

THE COURT: Do you have a provisional calculation of how much interest we're talking about?

MS. HAMMERMAN: I'm afraid that I don't have that

right here, Your Honor, but we have done the calculations at least to the extent that I can stand up here and say that it is possible under the interest rates we're claiming for us still if we recover against the other estates for us to continue to get post-petition interest on these claims. And in fact the interest rate that you would apply in doing those calculations, that's not set either.

We have our position as to what the contractual rate is, that we're entitled to the contractual rate under 506 pre plan, and post-effective date we argue that the plan gives us our full amount of our claim, and that would include the contractual interest up to the limit of our security. But Your Honor will decide that at the appropriate time.

And so it's simply -- since the variables are unknown here, will Citibank recover from all of the primary obligors and thus have a lot of room in -- in its security for further post-petition interest, what interest rate will ultimately apply since Lehman has made clear that they will challenge that interest as to -- as grossly inflated?

But the other point if we're going to talk about grossly inflated claims, and I certainly, you know, don't mean the fling mud, but this claim objection started out challenging Citi's claims as overstated by $1 billion, and we vigorously contest that.

But Lehman -- and I think this does factor into the equities here -- Lehman decided to double down on that claim. Lehman now claims that our derivative's claims are overstated by more than 2.2 billion and to the extent that Citi now owes money to Lehman.

So this -- and in fact I think in their counts 18 and 24 on a combined basic under the derivative's claims they are asking -- they claim that Citi owes them $230 million.

So this motion and Citi's right to post-petition interest only makes sense if Lehman has grossly inflated its claim objection, has grossly inflated the amount that it calculates Citi is due under these derivative's claims -- or correcting that what Citi now owes Lehman.

So the impossibility of canceling out Citi's debt to Lehman of $2 billion and canceling out the claims Citi owes I think you can see why that would not be prudent accounting in the circumstances.

I think that in addition all we would note is Lehman does claim to be giving something up here. We submit that Citi has no benefit, but maybe fairness is that they're giving something up.

They claim that under the 2009 stipulation, April 2009, which they have attached as Exhibit A to their reply papers, that they have the benefit under that stipulation of

FDIC protection on the $2 billion account.

Well in fact that FDIC protection, if you look at the stipulation itself, that FDIC protection is provided under the temporary liquidity guaranteed program, and the TLGP by its terms was temporary, it was expected to be temporary, it was a temporary response to the acute moments of the crisis, and it lapsed, it lapsed long ago, and the debtors can see that if they look on the FDIC website.

So long ago the debtors faced and fully absorbed this is what they say they're giving up -- they're going to absorb the collection risk from Citibank. They've always had that risk.

So I guess while I understand that Your Honor has expressed some discomfiture with Citi continuing to accrue interest here, Citi claims that is their right under the law.

Citi would also submit that the equities here do not favor Lehman. Lehman has not tried to simplify and settle this case. If anything they've expanded it. They have controlled the timing of the litigation, the pace of the litigation, but also the scope of the litigation.

As we stated in our papers, Lehman could have easily decided to satisfy -- resolve and satisfy those portions of the -- of Citibank's claims as to which they had no reasonable dispute, and we submit there are plenty of

those, and we have given examples in our papers to Your Honor in the opposition, and the reply papers from plaintiffs do not address that. They simply do not address that.

So while the injury that they're claiming is we say a product of the legal regime here and is simply what they had to figure into their calculations in suing an oversecured creditor, we also submit that to a certain extent this is a self-inflicted injury. Because to the extent they could see themselves clear to acknowledging that there's a large portion of Citibank's claim as to which they have no conceivable argument they could cut off that principal which would be accruing post-petition interest.

So in closing, Your Honor, and thank you very much for being patient with a long-winded argument, we submit that there's no legal basis under the -- under the Bankruptcy Code for Your Honor to grant this motion. That granting this motion would abridge Citi's settled expectations and vested rights under the plan. And that in these circumstances there is -- it would simply be inequitable to Citi and it would remove the one -- the one little amount of leverage -- and I'll accept leverage -- that Citi has in moving this case along to an appropriate resolution.

We will note, and Your Honor pointed out, that

JPMC agreed to give up post-petition interest. They got a whole lot of other benefits, but they agreed to give it up. That -- in that case -- that case the initial scheduling order has now slipped and the scheduling order that exists now it's two years later.

So we submit that the equities do not favor granting this motion, not that any free floating appeal to equity could be a basis for this motion, and I thank you very much for hearing me.

THE COURT: Okay, thank you.

Mr. Kirpalani, you have a lot to respond to.

MR. KIRPALANI: Yeah, I'm not sure I'm going to be able to respond to everything that was said, Your Honor, but I'm going do my best.

The first thing I want to start with is counsel I believe said I think wrongly that in the Calpine decision, and I think I did acknowledge that it's not on all fours, and it's certainly not controlling precedent, and that it is analogous I do believe, but there's a factual statement that was made that is wrong. I believe she said that there was not a hint that the debtors might have claims, that it just came as a surprise, nobody realized. So I just want to read from the transcript, which is attached to our papers.

On June 21 of 2006 before the Honorable Judge Lifland counsel for the debtors said, I quote, "As we set

forth in our papers of course we are reserving all of our other rights, and I don't suggest we are waiving any rights, including the right to ultimately attack or challenge the first lien holder's liens." And then it goes on to talk about, "and of course we're going to challenge the make whole too." So I just think that is an incorrect statement.

However, I also want to caution that we are not suggesting that Calpine is on all fours. Calpine for the record and for Your Honor's clarity does rely on 105 coupled with 363(b).

I accept Mr. Shimshak's statements. Mistake, it is not a Section 363 issue before the Court here.

We do believe that 105 and 502 does give Your Honor enough play in the joints to accomplish a just and equitable outcome.

I'd just like to read a provision from the Calpine appeal in the District Court where the Court noted, "A bankruptcy" -- quote, at page 593, "A Bankruptcy Court's exercise of its equitable authority is reviewed for abuse of discretion.

Abuse of discretion is one, a decision resting on an error of law such as application of the wrong legal principal or a clearly erroneous factual finding, or two, a decision that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be

located within the range of permissible decisions." End quote.

"Moreover, to further the purposes of Chapter 11 reorganization a bankruptcy judge must have substantial freedom to tailor his or her orders to meet differing circumstances and the citation as to integrated resources, and to the Second Circuit's decision in Lyonell (ph)."

And what we would submit, Your Honor, is this is an entirely unique situation. We're getting a tutorial from Mr. Shimshak about the way banks work. We're getting a tutorial about how this is their God-given right to assert a setoff claim. And somehow as a setoff creditor they are a secured creditor under 506, and even though it seems inequitable on these facts they're entitled to assert it, admittedly, as leverage the post-petition interest.

But, Your Honor, they also talk about -- I almost I thought I heard Ms. Hammerman say that if Your Honor thought -- rather than forcing a setoff or a provisional allowance that would disrupt their accounting mechanics I thought I heard her say -- but I don't want to misstate it that Your Honor could always if you thought it was unfair just not do that but stop the accrual of post-petition interest, just on the equities, it doesn't seem right.

We'd be fine with that, Your Honor. It's not the mechanic that we're thrilled with or trying to push down

anybody's throat, it is the inequitable situation that we're stuck with.

And I -- again, I'm concerned about the integrity of the court, I'm concerned about, you know, making an argument that Your Honor takes away and then later finds out, you know, that was an improper thing for me to try to persuade you on. So I'm not doing that.

I'm not going to tell you, Your Honor, that 506(b) gives you discretion to determine interest rates, no matter what. I can't do that. I can't do that. I am stuck with what the case law provides.

But I do think, Your Honor, you definitely have the power under 1059a) and 502 to provisionally allow, if they're not comfortable with that result and they would prefer for their internal purposes to simply accept that from today forward we can argue about what happened in the past and what the reasonable rate was or what they're charging, from today forward in order to accomplish their legitimate accounting integrity issues and the interests and needs of creditors of Lehman we can stop the burn of interest. And they are obviously using the cash in a productive way.

It is very disanalogous from a situation of a secured creditor who is really being precluded and injured by the automatic stay and not being able to move on with

life. They are making good use of the funds, which they should be doing. But they shouldn't be charging the estate at the same time.

Another area, Your Honor, that I'd like to cover is Mr. Shimshak said our plan. We got a tutorial on what our plan provides.

But what I would like to point out is the issue that they simply can't or chose not to respond to is Mr. Shimshak said we have a contract, the plan is a contract and it creates rights, and they told us how the plan works.

There's another contract that Mr. Shimshak didn't mention, and that's the stipulation on reserves. The stipulation on reserves with Citi specifically cites Section 8.4 as applying to their claims.

Section 8.4 of the plan says, rather than contract rate or applicable law we're no longer in the pendency interest world of petition date to effective date, Supreme Court says that's dependency interest world, we're not in there. After that you have to look to what the plan says.

They say Section 8.4, which limits interest post-confirmation to whatever Lehman's estate is earning on the money to prevent this exact problem. It says that's all they get.

So what's their answer as to why that doesn't seem to work? That's the contract, the plan that they say they

accept, and they have another contract, their stipulation, which specifically says 8.4 governs their claims.

Their answer is, well the plan says elsewhere that we're entitled to get all, we're entitled to it be paid in full. Quote/unquote. And so they jam into the words in full this reading that they're entitled to do what the Supreme Court says stops at the effective date and get post-petition interest at whether it's five percent or what have you, with the compounding this is hundreds of millions of dollars. Even from March 2012, the effective date till today, it's probably $250 million.

So if Your Honor -- if we can get a decision from the Court that even the plan, Section 8.4, does stop the alleged 506(b) interest that they are asserting and now it's governed by the plan I think Your Honor certainly has the power to interpret the plan and the confirmation order, the contract, and that would be a result that would be of great value to testate, and it was alternatively sought in our motion, Your Honor. It does not have to be the mechanic that we came up with. Just because JPMorgan seemed to be able to be comfortable with it we don't understand why Citi is not.

I will tell Your Honor that JPMorgan, there was cash that they also applied on disputed claims. So it's not entirely different the way Citibank makes it seem.

I think --

THE COURT: Mr. Kirpalani let me ask you something.

MR. KIRPALANI: Uh-huh.

THE COURT: It's been a very interesting argument. And one of the thoughts that occurs to me now is that it may be premature. One of the issues that bubbled up in my mind as I was hearing the argument about the calculation of interest and the fact that interest was being used as a form of leverage, in fact Ms. Hammerman acknowledged that it was a form of leverage, but a permissible form of leverage and one that Lehman and the plan administrator has been using apparently successfully in ongoing negotiations in the mediation and ADR process.

My thought is this. I don't even know at this point whether interest even applies, because the dispute is not really ripe for determination unless the parties choose to settle it, and at some point in the future there may in fact be a litigation in which there's a determination made one way or the other as to whether Citi is or is not over secured. Only then really is the question of entitlement to interest ripe for determination, and at that point, presumably, parties will be making arguments as to what the rate should be, what the entitlement is, why the facts and the law justify such an outcome.

As I've been thinking about the argument I've been characterizing it in my own mind as an incredibly interesting and novel argument both on the part of the plan administrator, the committee, the estate, whoever it is you represent right now, and Citi arguing a whole host of largely theoretical propositions, which admittedly would require, if I were to grant you the relief that you seek, me to make a number of leaps. I don't know that those leaps would constitute an abuse of discretion.

But as I'm thinking about this and the exercise of my discretion I'm questioning why I need to do it now. And the fact that you have waited this long to bring this to my attention is something of a double-edged sword.

It suggests on the one hand that perhaps the estate or the plan administrator had not focused on the negative impact of the hypothetical interest accrual or it may reflect a desire on the part of the plan administrator now to seek to tilt the playing field a little bit in ongoing negotiations by removing the ongoing accrual of post-petition interest as part of the calculation to be made in thinking about how to settle this, if as and when the parties do that.

To the extent that may be, and I'm simply thinking out loud with you, to the extent that may be one of the motivations for doing this I begin to question whether

that's a place I should choose to tread at this point in the exercise of discretion. Because regardless of the merits of the various legal arguments that have been made the real economic issue seems to be, and don't think I'm disparaging you when I say this, something of a shell game in which there's a provisional allowance of a claim with all rights reserved around that, but it's not happening in 2009, it's not happening leading up to the confirmation of the plan, it's happening almost two years after confirmation of the plan while active litigation is pending between your clients and Citi.

And so I end up thinking, not knowing everything that's behind the curtains, because there's always something behind the curtains that you don't see in court, well, why is this being presented to me for determination today as opposed to three years ago or two years from now?

And so one of my questions to you in this long-winded musing is why do I need to do it now and is it really ripe, and it is appropriate for me to do it if it has an impact upon negotiations that may take place in the future to hopefully bring this dispute to a conclusion?

MR. KIRPALANI: Thank you, Your Honor.

I think the easiest and most direct way to answer the Court's question is as Your Honor knows from your work as a mediator it's very, very difficult to engage in any

attempt to resolve big ticket litigation where you're talking about billions of dollars when every single day the bookends are moving further apart.

So I don't even mean to disparage Citibank about the interest rate arbitrage, it's a fact of life. And if the purpose of the bankruptcy is to get claims resolved, and that is in fact the core function of a Bankruptcy Court to resolve them using equitable means, to do so and to stop wasting so much behemoth (ph) money back and forth, the debtors, the plan administrator, the creditors' committee plead in that vein for equitable powers to be used to stop the bookends from moving. Every day they move in one direction and it's making it more and more difficult to get to resolution.

In terms of the equities on the other side they Have, and we've only learned through this process, Mr. Shimshak would say I should have gone to better law school or something if I don't understand the debt relationship between banks and deposits -- I did think there was cash sitting somewhere. I did.

So this became an illuminating fact for us that now they've actually had full use -- full enjoyment of $2 billion for five years, and yet at the same time they have asserted they will be charging -- I'm not going pick the interest rate because I didn't follow it -- some amount

of interest that is definitely hundreds of thousands of dollars a day, and that that's going to happen every day, because under the stipulation that they entered in April in 2009 they only have to pay us two basis points.

From the estate's perspective whatever equity the estate has into this collateral, i.e., the setoff right, the deposit, is wasting and diminishing.

And so in the interest of getting the litigation resolved we believe, and I would actually challenge Citibank to disagree, we believe eliminating some of the moving pieces is a good thing, and that's our position, Your Honor.

This is a moving piece. We thought about frankly making a motion for partial summary judgment in the adversary over the interest issue, and that may be something that we seek permission to do if Your Honor is not inclined to do this on an equitable basis, but it is an issue that although there are a bunch of theoreticals embedded in it, and we appreciate that, it's very difficulty even for us to get our arms around this and we live this, there are certain principals that should apply. And cutting off the post-petition burn, certainly post-effective date, when Citibank has had the full use and enjoyment of the cash, subject to the credit risk that they have to pay us $2 billion, you know, at some point if we're right, suggests to us that it is ripe for determination and that is the basis of the

motion.

THE COURT: Let me ask you this follow-up question with particular reference to your suggestion that one of the alternatives you thought about was maybe seeking leave to bring a motion for partial summary judgment that I presume would seek a determination as a matter of law that post-petition interest or post-confirmation interest should not be accruing any longer.

One way to look then at this pending motion is that it is in effect the functional equivalent of a motion for partial summary judgment with respect to the right to continue to accrue post-confirmation interest, because if I were to grant you the extraordinary relief that you seek under 105 dealing with those moving parts of 502 the impact of this would be that henceforth there would be no ongoing interest accrual.

Now, I'm questioning in my own mind whether it's appropriate for this to be what amounts to a -- an unconventional alternative to that kind of substantive motion, which would be record-based based on the law and presumably would not be a 105 motion, because I've never seen a 105 motion for summary judgment. Maybe you have, but I haven't.

So you've given me another reason to sit back a little bit in my chair and think twice about whether or not

this is the right thing to be doing now. Quite apart from whether or not someone is sitting here courageously might stake out a claim for advancing jurisprudence along the lines that you've suggested. I'm not saying it's impermissible, although Mr. Shimshak has said that, but it may be unwise.

Mr. Shimshak, do you wish to say something?

MR. SHIMSHAK: Yes, Your Honor, I have a number of comments, and I want to come to the introductory comments that you made in the last exchange about this potentially being not ripe, but I want to clear some other things away first and then focus on that, because that's very important.

Lehman said that a determination of the appropriate rate of interest was one of the alternative forms of relief that it had sought on this motion. I believe that's what we just heard.

I'm looking at page 1 where -- of their motion where they outline the forms of relief they're seeking. That is not one of the forms of relief.

So the statement that determining the appropriate rate of interest is one of the forms of relief they've been seeking on this motion is belied by the bullet points that outline the relief they're seeking.

Second, there was a -- there was a discussion about the stipulation of reserve stipulation that went into

-- that went into place. The amended stipulation establishing distribution reserve. And there was the suggestion that there was a conspicuous silence on our part in not addressing the supposed or the perceived impact of that reserve on the interest rate. But the reserve itself states that the reserve, and I quote, "In the event that the Bankruptcy Court by a final, non-appealable order determines that any of Citibank's claims identified in the stipulation are allowed unsecured claims."

The purpose of the reserve -- the purpose of the reserve stipulation was a mechanic that took place at the time of the confirmation of the plan -- or the submission of the plan. Because we had potentially large claims and we had this $2 billion reserve or this debt that we owe Lehman. And the negotiation was, well, if it's determined that you have unsecured claims that would be one of the places that you'll look. Effectively you'll be able to reduce your claims even though unsecured by offset against that -- against the $2 billion obligation, so that Lehman did not have to put more cash into the cash reserve for the benefit of our potentially unsecured claims. So that's what the stipulation did.

I was gratified to hear that Lehman has abandoned any effort to bring this within Section 363(b). I think that's long overdue. It was evident from the filing of the

motion that 363(b) was not an available form of relief and one would assume familiarity with their own plan.

The discussion about Calpine is equally irrelevant in that regard, because Calpine -- one thing Calpine was, was relief granted under Section 363(b). It's right on the face of Judge Sheindlin's decision.

There was also reference somewhat sarcastically to our God-given rights of setoff. No, they're not God-given, their congressionally given though. Section 553 is explicit. It says in 553(a) except for enumerated exceptions, "Nothing in this title …" meaning all of title 11, "… shall affect the right of setoff."

I would submit that includes section 502(b) if it is diminishing our right of setoff in any fashion.

There was again reference to the fact that we've had this $2 billion and it's really unfair for us now to be seeking post-petition interest if the claim is reduced to a level where that becomes a meaningful consideration, that that's somehow inequitable.

But what that argument really means is even though we've caused you independent economic harm as evidenced by the claims that you have asserted against us, the derivative claims that we've asserted, the Hong Kong loan guarantee claim, which they haven't paid, the derivative claims that they haven't paid, even though we've caused you separate and

independent economic harm you're not entitled to be compensated for that harm through the passage of time. That argument makes no sense.

We're entitled under the Bankruptcy Code and as a matter of substantive law to protection of our setoff right to the full extent permitted and we maintain that includes post-petition interest and post-confirmation interest.

553 can't be tampered with.

You can't use 502(b) to put a gloss on Section 363.

Nothing in Title 11 can reduce those rights.

Then there was a retreat to 502(b) again. And, Your Honor, you will have to decide, if you decide this to go forward with this at this point or at some later point, whether your equitable powers to enforce the provisions, to implement the provisions of an expressed statute -- a provision of a statute which talks about allowance of claims except in enumerated circumstances where claims are disallowed -- whether that provision allows you to breathe in to Section 502(b) through Section 105, the ability to cut off a creditor with a setoff right that creditor's entitlement to post-petition interest.

Now let me come back to the introductory comment about ripeness.

I certainly can't quarrel with that proposition,

it's one we've made in our papers, that this entire controversy is not ripe for determination at that time. There are a million things that can happen between now and the point where this issue should be legitimately addressed, and that anything right now is purely hypothetical, purely speculative, and the other word for that is purely advisory. There are not a ripe set of issues before you. The claims have not been --

THE COURT: Excuse me.

MR. SHIMSHAK: -- the claims have not been determined, the interest rate has not been determined, the litigation outcome in its entirety has not been determined. All of these matters should await another day.

And depending on the facts -- depending on the facts as I said in our earlier comments, the means exist to deal with the situation.

You can rule straight up on the law on that point to the extent of our secured rights and our rights of setoff, you can deal with their claim that we've done something wrong through the count of their complaint that seeks equitable subordination.

The moving goal posts that were described as Your Honor correctly observed are nothing more than the consequence of the inner play between our rights -- our rights -- our protected rights and a litigation that they

brought and that is lasting a long time, and that's regrettable that it has to last as long as it has. As Ms. Hammerman indicated, that's not a matter that's been within our control. We would love to see the scope of discovery narrowed. We would love to see the litigation move at a better -- at a better pace. We would have loved to have been in settlement discussions with them. They discontinued the settlement discusses.

So the notion that this is inequitable, that the moving goal post is somehow inequitable is tantamount to saying that a creditor's rights with setoff rights in the event that his claim is oversecured it's inequitable for him to get what the Bankruptcy Code has prescribed.

I liked your description of this as tilting the field, I think that's what this boils down to. That's what we've been maintaining, that this is really an attempt to tilt the field in Lehman's favor through extraordinary relief that's not available to bring us to a negotiation with having lost or having lost substantive rights to which we're entitled.

I think the whole matter is premature, it should it should not be decided, there's no basis even I would maintain for the kind of provisional determination of the appropriate interest rate because that issue too is not ripe at this time.

Thank you, Your Honor.

MR. KIRPALANI: Thirty seconds, I promise.

You've given us a lot of Your Honor's and your staff's time, and I just want to be very brief.

First, the reason why we didn't choose to proceed by writing a letter requesting permission to file a motion for summary judgment or partial summary judgment was not because we didn't think it was ripe, but rather I don't believe Your Honor has had the opportunity to fully understand what this lawsuit has been doing to the estate, and I thought -- we thought that a letter seeking partial summary judgment without any background would look like we are trying to tilt the playing field, if Your Honor will. We're not trying to tilt the playing field, we're trying to even the playing field so we can have a rational discussion.

And I won't go into any back and forth discussions that have taken place, but we thought this was an appropriate way to address the Court as to the current inequitable situation facing the estate and its creditors when there is absolutely no injury on either side, rather what we would call almost a gotcha situation by a very powerful creditor.

That's it, Your Honor.

THE COURT: Okay. Thank you.

I almost left the bench during the last three

minutes of Mr. Shimshak's argument because I was choking, but it had nothing to do --

MR. SHIMSHAK: I'm the one with the cold.

THE COURT: -- but it had nothing to do -- it had nothing to do with his argument.

This is a very challenging and innovative argument and I'd say that applies on both sides. And the estate has made what I consider to be a very creative argument and a persuasive one relative to the ability in concept to provisionally allow the secured claim. But of course it's not a secured claim.

And as I was reading the papers I will confess I did not have a full appreciation of the nature of the relationship that existed between Citi and the estate. And for that reason what Mr. Kirpalani has characterized as the tutorial was actually quite helpful.

I will note however that I am generally familiar with how banks work, that's not to say that I'm specifically aware of how each espoke (sic) arrangement may work between a depositor and a financial institution.

In this instance Citi, through counsel, has made a coherent argument about preservation of rights, and that is in effect the essence of their position here. It is an argument based upon rights of setoff preserved under the Bankruptcy Code, and I'm familiar with how that works and

have written on that topic.

So the question really becomes one of whether or not it is appropriate for this Bankruptcy Court in this extraordinary bankruptcy case to do something unprecedented. And I believe even the movants would concede that what we're talking about here has never been done before.

There are a couple of ways to analyze this.

One is just because it has never been done before doesn't mean it isn't permissible to do, assuming that it's the right thing to do.

Another is in a case of this global prominence is it appropriate after the plan has been confirmed and while significant litigation is pending to take action such as this that would have the economic effect of depriving a major creditor of substantive economic rights?

I conclude that the latter alternative is what applies here and that it would be an inappropriate exercise of this Court's discretion in the present context to provisionally allow a claim with all rights reserved if the economic impact of so doing would be to cut off a claim for post-confirmation interest.

In saying that I do not wish to dignify that claim. That claim may for other substantive reasons not be allowable as a matter of law or not be allowable as a matter of fact or not be appropriate given the equities of the

case, and as to that issue or series of issues the Court reserves all judgment for future hearings.

I'm also motivated in reaching this conclusion by the mental impression earlier described that this is not the right time to deal with this question.

As Mr. Kirpalani has pointed out in his argument, while this case has been pending for quite some time this is really the first major proceeding that has taken place in the case that has involved significant interaction between counsel and the Court.

Unlike other adversary proceedings that are pending on my docket in the Lehman case this one has been running silent and running deep in the sense that it hasn't surfaced as a dispute that has required by attention.

I'll contrast it with an earlier matter on the docket, Giant Stadium. I've heard all too much from them and so I have a pretty good understanding as to what that dispute is about.

That's another reason why I believe it is unwise for the Court to exercise what would be a truly unusual, unprecedented, and extraordinary reach of 105 coupled with 502 power to preemptively cut off legal rights of Citi.

This is all without prejudice of course to reconsidering the question at some future date, and I would consider today to be a marker of sorts. This is the date

when the Court could have cut off the running of post-petition interest, and as a result it might be argued by somebody in the future, to the extent that the facts and legal argument might support the proposition that the effective date for cutting off interest might be today.

Thank you for the argument, we'll move on to the next matter.

MR. SHIMSHAK: Thank you, Your Honor.

MR. KIRPALANI: Thank you, Your Honor.

MR. SHIMSHAK: Your Honor, may we have permission to leave?

THE COURT: Everyone who's involved or interested in the matter that was just argued may be excused.

MR. SHIMSHAK: Thank you.

(Pause)

THE COURT: Now, before we start, I've been at this now for two and a quarter hours. I'm assuming that this matter involving the litigation against Tschira --

MR. TAMBE: That's right, Your Honor.

THE COURT: -- will not be particularly time consuming unless you tell me otherwise.

MR. TAMBE: I don't anticipate it will be, Your Honor. I think it'll be relatively short, but Mr. Brilliant may have something to say about that.

MR. BRILLIANT: What do you mean by -- I mean

clearly it won't be as long as the last one, Your Honor, it may take --

THE COURT: No, that's not my -- that's not my point -- that's not my point of reference. My point of reference is whether -- and if that's your point of reference we are really not speaking the same language.

We've been here to the point that it's almost the lunch break and I want to excuse those lawyers who are here on FirstBank Puerto Rico versus Barclays, because whatever happens in that argument I'm going to take a lunch break and return at 2 o'clock. So those of you who are here on FirstBank Puerto Rico, and I apologize for the fact that this is now the second time that you're having to come back, but you'll make come back at 2 o'clock. And if you're interested in what's happening now you're welcome to stay, but you're also free to go and come back at 2:00.

MR. BRILLIANT: Your Honor, and I don't know if you want more of a response to that, but I think counsel and I have a disagreement about what -- you know, what the nature of this hearing is.

It's the, you know, first initial pretrial in connection with the -- you know, the filing of the adversary complaint.

THE COURT: Well, we can talk about that disagreement right now, but all I'm -- this was purely

housekeeping. I was excusing lawyers as a courtesy to them and I was excusing others who might be in the gallery as a courtesy to them who might only be interested in the FirstBank Puerto Rico matter, because I'm not going to hear that before taking a lunch break. That's the only thing I was doing.

MR. BRILLIANT: Okay, I am sorry, Your Honor.

THE COURT: I was also seeking some guidance as to whether you guys are going to be time consuming and burdensome, because if you are I'm going to take a lunch break now.

So I'm giving you fair warning that I have limited patience at this moment for a long-winded argument, and if you would like a more patient bench you'll come back after lunch too. But if this is going to be a 20-minute event lest let's just go for it. Up to you.

MR. TAMBE: I expect it to be no more than 20 minutes, Your Honor.

THE COURT: Fine.

MR. TAMBE: Jay Tambe from Jones Day on behalf of the debtor, and this is the adversary complaint that was filed by Lehman against the Tschira entities.

I think Your Honor is familiar generally with the relationship of the KTS entities as we refer to them.

THE COURT: I am.

MR. TAMBE: And Lehman.

There are two matters I think that are really up for today. One is the briefing schedule on a motion to dismiss that was filed by the defendants. They filed that motion on Monday -- this past Monday the 21st. We have agreed with them on a briefing schedule. We will be responding to that motion on the 4th of November, and I believe they will be putting in their reply two weeks thereafter on the 18th of November.

If Your Honor would like to schedule oral argument I think we're generally available thereafter for oral argument.

We're also perfectly happy with the motion being disposed of on the papers.

We don't believe the motion really raises any novel legal issues. I think most of what's being addressed in the motion is well-trod ground from the JPM decision.

This case involves a transfer of 100 million euros on the 12th of September from LBHI to the Tschira entities. I don't think there's any dispute that the money in fact did move. We outline in the complaint the circumstances under which it moved, and we believe there was an actual fraudulent intent to gratuitously transfer money to the KTS entities, to have them hold that money just for a period of one week to get over what they perceived at the time to be

problems, credit worthiness issues with the Lehman entities.

We think we have pleaded all the requisite elements of the various claims we make. We make nine separate claims. They disagree with us on some of those claims. I think in the briefing we'll sort that out and we can move forward.

The other issue other than the briefing on the motion to dismiss is what happens to discovery in the interim?

We have sought to meet and confer with them to agree upon a schedule. They -- their position is that no discovery should take place until the motion to dismiss is resolved.

Given the history and this Court's familiarity and prior decisions we don't think there is a good basis for this Court to exercise its discretion and stay all discovery.

Whether some claims are dismissed or not it's clear to us that there is in light of the JPM decision a strong likelihood that in fact we have stated claims with respect to actual fraudulent intent as well as the common law claims. Those claims are going to proceed. The discovery is common to all claims. Discovery should proceed.

We have proposed a discovery schedule. Their

position again is that it's premature to consider a discovery schedule, and that's really the one point of disagreement for today's purposes is whether discovery should go forward while the motion to dismiss is pending.

THE COURT: Okay.

MR. BRILLIANT: Your Honor, Allan Brilliant on behalf of the Tschira defendant entities from Dechert LLP.

Your Honor, you know, counsel is right, we –- we have agreed on a schedule with respect to the -- you know, the briefing of the motion to dismiss, but we think that it's a very strong motion to dismiss, that there's only nine counts to it. It's very different than the JPMorgan complaint that Your Honor has dealt with previously.

There are five counts that we believe will be dismissed consistent with JPMorgan, you know, based upon the safe harbor provisions of the Bankruptcy Code.

That's going to leave, you know, the actual fraud claim under 548, you know, (a)(1), which is not expressly eliminated by that, and then there's three other common law claims. One is a claim for unjust enrichment, one is a claim for constructive fraud, and one is a claim they're alleging fraud on behalf of the Tschira entities in getting the collateral.

Your Honor, unlike the JPMorgan case they do not claim that we're insiders or that we had any ability to

control the business of the company or that there was any justification, you know, that the Tschira entities had over the operations of the business of the company. In fact they concede in their complaint, you know, that none of those factors, you know, are here. So this is very different than the JPMorgan situation.

They're claiming that they transferred $100 million as collateral, not a permanent, irrefutable, irrevocable transaction, but just as collateral $100 million in connection with a derivative transaction and that they did it with actual intent to hinder, delay, or defraud.

But in their claimant they don't say who it was, who intended to defraud the debtors, and they don't come anywhere close to pleading the type of specificity that Your Honor dealt with in the JPMorgan case.

So our sense is unlike the JPMorgan case Your Honor is going to dismiss the actual fraud claim here.

As for the other three counts, Your Honor, there's a very different scenario here as well than the JPMorgan situation.

LBHI was the guarantor of the LBF, you know, the Lehman Brother Finances obligations here, and the contract was between LBF and the Tschira entities. And the only contract that existed here was the contract -- was a guarantee from LBHI.

Now LBHI provided, you know, the collateral, they were the guarantor and the credit support, but if the money were to come back under the contract it would go to LBF. And in fact in the LBF proceedings the Swiss --

THE COURT: Why do I feel that I'm hearing an argument on the motion to dismiss?

MR. BRILLIANT: Well because, Your Honor --

THE COURT: Because I am aren't I?

MR. BRILLIANT: No, you're not, Your Honor. The issue --

THE COURT: Yes, I am, that's what I'm hearing. I don't want to hear it anymore. That's what I'm telling you. Stop it.

MR. BRILLIANT: Okay. Then let me -- all right. So, Your Honor, here's where we are today. I don't know how familiar you are with the pleadings that have been filed.

THE COURT: I'm reasonably familiar.

MR. BRILLIANT: Okay.

THE COURT: Familiar enough to be able to deny you request to stay discovery. So that request is denied.

MR. BRILLIANT: Can I have a moment to go through the law and, you know --

THE COURT: No.

MR. BRILLIANT: Okay.

THE COURT: The request is denied. I've given it

full consideration. It's -- particularly in light of my knowledge of the case before you arrived and other issues that relate to your client.

MR. BRILLIANT: Can I have an opportunity, Your Honor, to --

THE COURT: You're just going to let me finish what I'm saying before you seek an opportunity to respond to what I'm saying.

MR. BRILLIANT: Yes, Your Honor.

THE COURT: Wouldn't you think that's fair?

MR. BRILLIANT: Yes, Your Honor.

THE COURT: That I speak, then you speak?

MR. BRILLIANT: Yes, Your Honor.

THE COURT: Okay. So please don't interrupt me in the future.

MR. BRILLIANT: I will not, Your Honor.

THE COURT: Thank you.

Particularly because of my familiarity with the history of the relationship between your client and LBF and your client and LBHI and positions that your client has taken through other counsel as recently as a few months ago I don't believe this is anywhere near as simple as you would suggest or try to argue and this is going to be treated like any other case.

You have a right to dismiss, you agree to a

briefing schedule, such discovery as the parties wish to take will be taken and will not be stayed, and there will be oral argument.

MR. BRILLIANT: I'm sorry, Your Honor, did --

THE COURT: And there will be oral argument.

MR. BRILLIANT: There will be oral argument. Okay, thank you, Your Honor.

THE COURT: Now you can say whatever you want to say.

MR. BRILLIANT: Yes. Your Honor, I guess the -- you know, the first thing is, you know, the issue, you know, is a discovery schedule if there's going to, you know, going to be one.

THE COURT: Work out the schedule.

MR. BRILLIANT: Okay.

THE COURT: Work out the schedule, I don't do that for you. It's like any other case. If you're trying to make this special and exit early it's not happening. There's nothing special about your motion to dismiss. Nothing whatsoever. I reviewed it last night.

MR. BRILLIANT: Thank you, Your Honor.

THE COURT: Is there anything more?

MR. TAMBE: No, Your Honor, I think we're done. Thank you.

THE COURT: Thank you. We're adjourned until

2 o'clock.

(Recess)

MR. MORAG: Good afternoon, Your Honor.

Boaz Morag of Cleary Gottlieb Steen & Hamilton for Barclays Capital, Inc.

We're here this afternoon for a hearing that we've given FirstBank any number of opportunities to avoid having. We're here on a motion for a determination that FirstBank is in contempt of this Court's sale order injunction and has been since December of 2009 when it filed this lawsuit, that it continued to prosecute this lawsuit and continues to prosecute this lawsuit to this day for suing Barclays to recover purchased assets that Your Honor explicitly enjoined in the sale order injunction. Barclays is entitled to all of the immunities and protections of that sale order, which in this circumstance include compensation for the damages Barclays has incurred in the form of attorney's fees to defend this action.

If I may approach, I have just a short hand out with some timelines on it.

THE COURT: That's fine.

MR. MORAG: The first page is simply a chronology of events, but I think the Court is aware of the summary judgment decision, virtually all of these events were recounted there. But what you have here is a situation

where FirstBank had one actual notice of a sale order. Indeed in the September, 2009, letter that FirstBank sent to Barclays before filing suit, three months before filing suit, they acknowledged studying the sale order, the assets purchase agreement, the clarification letter, and understood and assumed in that letter that the securities that had been transferred to Barclays on September 18th, 2008, were in connection with the very repo that was discussed in that letter and deemed by the parties to be purchased assets. And in that letter, they said they were attaching the list of CUSIPs so that we could get back to them and confirm one way or the other, but they never attached the list.

So we wrote back in September of 2009 and said, you didn't give us the list, but what we can tell you is, if you're right that we got these in the repo, they're purchased assets for the following reasons, put them on notice of the injunction and of the Uniform Commercial Code defenses.

They never sent the list of CUSIPs. They took three months and filed suit in the District Court, and asked at his deposition why they never sent the CUSIPs, the general counsel of FirstBank acknowledged, because it doesn't matter at that point because whether these securities were listed on schedule A or not listed on schedule A, they were going to file suit anyway because it's

always been their position that these assets should not be purchased assets even if the parties agreed that they were, even if the documentation provided that they were.

On that point, the second element of the test, the sale order was unambiguous with respect to the inclusion of the disputed assets -- securities, as purchased assets. Your Honor held that the 20 possessions were inescapably and indisputably purchased assets and that the sale order unambiguously protects Barclays from claims like these; that's at page 414 and 17 of your decision.

And perhaps equally important, the third and fourth prongs of this -- of the test for willful contempt, FirstBank was admittedly able to comply with the sale order and did not make any good faith effort to comply and FirstBank did not seek to have the sale order modified in any way as it could have done or pursued any of the alternatives that it had to avoid contempt.

The whole point of the sale order, Your Honor, was to provide a remedy for parties that claimed to be in FirstBank's position of claiming an interest in securities and other assets that were transferred to Barclays. The remedy was not to sue Barclays -- that's the one thing they couldn't do -- but Your Honor specifically provided, is done in 363 sales, for the remedy of a claim against the proceeds. That was there for the benefit of parties like

FirstBank. That was something they could have done and, instead, in fact should have done, when for four years or five years, they've been telling the world their position is that these assets were never property of the estate.

If these assets were never property of the estate, they should have brought a motion before you or an adversary proceeding against the holder of the proceeds, LBI, the trustee, and LBHI, claiming they received proceeds that they're not entitled to because their collateral was never part of the estate. They never did that. They never brought an action against the LBI trustee for a declaration of whether these were purchased assets.

There were any number of things that they could have done. They contact -- as Your Honor found in the summary judgment, a decision. It was undisputed that by July, 2009, they had notice that Barclays had received these securities, notice they had gotten from J.P. Morgan. They could have filed a rule 60 motion by the deadline of September 20th, 2009 for that sort of relief.

They've been on notice and proceeding as if this -- and accepting the risk that ultimately that someone would disagree with their reading of these documents and that someday came in May when you rendered your summary judgment decision.

So, Your Honor, we think it's very clear and I

don't really have much more to say on the issues before the Court. We think that from the outset of this suit, they've been in contempt. They took the one action that clearly violates the sale order, which is suing Barclays and they've had any number of opportunities to avoid this result. We are not claiming that because they sued in December, 2009, as of -- after that they could do nothing to avoid this sanction.

As Your Honor knows, others have sued and no one else has been the object of a contempt motion.

THE COURT: What is it that makes is case different in what is the last clear chance, if that's the right way to term it, that they had to avoid sanctions and what did they do to fail to do that?

MR. MORAG: In my view, the last clear chance was on April 15, 2010 -- excuse me -- 2010, yes, when as Your Honor noted in your summary judgment decision that they were formally provided with a copy of schedule A that showed their CUSIPs were on this list. Before then, they had the opportunity that Your Honor gave them through an order entered by this Court on December 17, 2008, to get a copy of schedule A and B to the clarification letter simply by signing a confidentiality agreement. They didn't do that.

When we pointed it out to them, they said they were sending us a list of their specific CUSIPs and asking

us to confirm whether we received them -- pointed out that they hadn't sent us a list. They didn't send us the list when they realized that error.

So -- but if Your Honor wants to say a date, it's April 15, 2010. Everything that happened thereafter, and I will address, in a minute, the significance and lack of significance of the District Court's partial denial of the motion to dismiss. Everything that happened after that was simply confirmatory of what was the ultimate outcome in the summary judgment decision.

The summary judgment decision looked at the documents and said these are, on their face, purchased assets. They are listed on the schedule. The agreement provides that the assets transferred to Barclays in that repo are purchased assets. Not only are they explicitly defined as purchased assets, but they're explicitly defined as not being excluded assets.

There was no possible way to read it any differently. They had their theories and it is indelibly the case that litigants can act in subjective good faith even if they disagree, but that is not a defense recognized at all to a contempt motion such as this. They were on notice of the facts that they needed.

Now, with respect to the Judge Daniels' decision in May of 2010 to deny, in part, the motion to dismiss, I

would like to address that because I know that's a main feature of their opposition and it's an important point.

Your Honor, I think you've already considered this when you noted in footnote one to your opinion, Judge Daniels had to assume the facts alleged in their complaint was true. Their complaint alleged categorically these -- our securities were not purchased assets. They didn't bother to list the CUSIPs in their complaint. They didn't incorporate any documents that would let him look into is that.

He said precisely to us, as we've noted in our papers, Mr. Morag, you're making a nice argument for summary judgment, but we're here on a motion to dismiss. So what he decided was that based on that allegation, he could not dismiss all claims. That just means he had to follow Rule 12(b)(6); was not permitted to consider extraneous documents; was not permitted under the case law to make factual findings; was never asked to make any factual findings.

They posit that this denial of the motion to dismiss was based on a finding that this agreement was ambiguous. There was some uncertainty that let them have license to pursue this claim with some sort of dispensation or immunity from anyone later saying they're in contempt. They never asked for such an application. They never made

such an application. They never presented that issue to the judge. They never acknowledged the injunction before Judge Daniels. They always thought, and they continue to think, that they are right; that we're misreading the agreement; Your Honor is respectfully misreading the agreement and that if the District Court won't figure that out, maybe the Second Circuit will.

But this is -- so they've never sought to comply with this injunction. They never asked Judge -- they never to Judge Daniels, we're concerned about this argument that the other side is raising; we think we're entitled to go forward and we would like some clarity on that. They've construed this one-line order the way they would like to construe it, but there's no legal or factual support for that.

Now, with respect to -- and I reason I say there's no legally, factually, again, nothing was raised beforehand. We, in fact, in our motion to dismiss, reserved the right to say that this was contemptuous and to seek contempt sanctions later. They've never doubted or denied that they've been on notice from before we filed suit that this was our position and that we were going to pursue contempt sanctions.

And --

THE COURT: Just one second.

I don't mean to break into your argument, but you've distinguished the FirstBank case from other unnamed situations where third parties have either pursued claims formally or informally against Barclays as purchaser of the purchased assets and one case that I have in mind is Evergreen Solar. You, personally, were involved in that case, as I recall.

MR. MORAG: I was.

THE COURT: And that case resulted in a judgment in Barclays' favor, but it didn't include a request for sanctions.

MR. MORAG: That's true.

THE COURT: Can you explain to me the distinction, if there is one, between Barclays' decision to pursue contempt sanctions against FirstBank and its decision not to pursue comparable sanctions as to Evergreen Solar?

MR. MORAG: It was simply, Your Honor, that Evergreen Solar, we made a motion to dismiss. It was brought properly before Your Honor as an adversary proceeding in this court. We brought that before you and Your Honor ultimately granted that motion after resolving the Rule 60 issues and the challenges to the sale order.

The point there was that Evergreen Solar did sue Barclays, but it was resolved in a way that did not incur anywhere near the amount of expense that this case has

incurred. And the other point that we would make that this is a cumulative issues. We pointed out that the Evergreen Solar decision to Mr. Mitchell and his client a couple of days after it came down and said, look, the judge has considered the same repo and has said that all of these assets were intended to be purchased assets. Your assets are no different. The response was, our assets are different because Evergreen Solar was share lending agreement and we're a repo -- we're a swaps collateral. They've -- so we didn't make the business decision -- also at that point in time, it was after a year after they made the motion to -- that we made the motion to dismiss that Your Honor was able to resolve it on the same day as the Rule 60 and, frankly, at that time, very close to that time, Evergreen Solar was filing Chapter 11 in Delaware.

It was simply not -- we're not out for retribution here; it's a matter of considering the amount that it has taken to get to this point. We urged FirstBank when the case was referred to you to tee up this issue. We urged them to avoid the expense of expert discovery and tee up the issue before we embarked on that expense and they said no. And, indeed, the first question you asked us when we got here on the summary judgment hearing was, do I have even consider these summary -- expert reports and we both said no.

So we've given them any number of opportunities to avoid this day and this result and -- but consistent with their position, they -- this is the cost of taking their position. They've never tried to protect themselves from the very finding that you made, that, yes, indeed, this is purchased assets. They've never felt the need to protect themselves from the risk that they would have to pay anyone's attorney's fees but their own and that is simply not appropriate when every sign there was telling them that they should be really concerned about this risk.

After Judge Daniels said at the motion to dismiss hearing, the key question will be whether these were intended to be purchased assets. Well, by that point, they knew that they were on the list of schedule A. They then, in the referral order said, I find -- when I now consider things outside the pleading that these assets were ostensibly transferred under the sale order and now you're going to have to go to the Bankruptcy Court as a core matter, because this arises in that sale order, to figure out what rights, if any, that you have here. That was a clear sign that they were on ice, on thin ice, in the sense of if they prevail, fine, of course there's no contempt sanction; but if they don't, what argument is there that they are not on notice, not going in with their eyes open that they were at risk of being found to have done the act

that was enjoined.

THE COURT: Did you or did anybody on Barclays' behalf ever indicate to counsel for Evergreen Solar that there might be a risk of contempt sanctions if they pursued the litigation?

MR. MORAG: We may have, and I honestly can't remember. We may have in the briefing which noted that these were enjoined claims.

But the point is -- another point that I would make here is Your Honor found in summary judgment order that because this is a single case, all of the decisions that come before it are part of the law of the case, and so Evergreen Solar is part of what informs the outcome of the summary judgment decision in this case, just like the Rule 60 informed the summary judgment in this case.

The other difference is, Your Honor, in the -- the other difference is that Evergreen Solar -- and this is important, now that you remind me of focusing on that case -- Evergreen Solar joined the Rule 60 motion of the debtors and the trustee and the creditors committee and, indeed, I was here on the first day of the evidentiary hearing on that case where the lawyer for Evergreen Solar stood up and said we're here to join it and that's all we have to say, we're leaving it so everyone else. But it was a -- they had filed the paper, filed the joinder and that, a

Rule 60 motion, timely made is one of the things that you can do in the face of a sale order, if you have a good faith argument that it needs modification for some reason. That's one of the things that we say they could have done and should have done, and so that is another difference between this situation and Evergreen Solar.

THE COURT: This is one of those situations where a big bank, Barclays is seeking to shift to a smaller bank, FirstBank, the costs of litigation in derogation of the injunction and the sale order. What are we talking about in terms of the shift of costs that would be imposed on FirstBank in the event that I were to grant your motion?

MR. MORAG: Your Honor, we have not -- we know the totals and we know from the beginning, but we haven't done it as of other various dates. At the rates that have been approved by this Court in this and other matters, it's cost Barclays three million dollars to defend this case over four years, and we're not necessarily seeking that. We are -- the last thing we really want is litigation over the amount of the fees.

Our hope was to be in a position like it was in the Bank of America case, once Your Honor ruled of the entitlement to the fees, as part and parcel of the summary judgment ruling there, you, in effect found -- it's really the same procedural posture. You had a case that was filed;

you had discovery; you had an evidentiary hearing there that you didn't need to have here; you ruled simultaneously that the arguments against the violation of the automatic stay were not persuasive to you.

There was a violation of the automatic stay and the consequence of that is that Bank of America had to pay, as a matter of the automatic stay law, the estate's fees. The parties were able to go off and negotiate that number because that's what professional attorneys can sometimes do. That's our hope here. We're not looking to have a litigation over the fees; it will be partly based on the -- we'll give them the data, they can tell us what they thought was unreasonable and we can hopefully come to an agreed number so they can appeal the merits, the summary judgment decision they want to appeal -- they presumably would appeal this contempt -- but hopefully not an issue over the amount of the fees.

THE COURT: Okay. Just to review the procedural posture, for a moment, particularly as it relates to the contempt motion that we're dealing with now, my understanding is that whatever the outcome today may be will be made part of an appeal to Judge Buchwald --

MR. MORAG: Yes.

THE COURT: -- of the summary judgment decision and, in effect, will be part of a consolidated appeal; is

that correct?

MR. MORAG: Yes.

THE COURT: Now, assuming for the sake of argument, that I were to agree with you on the sanctions, but I'm not assessing damages respect to the sanctions because I'm hoping that reasonable people can meet and confer and perhaps reach an understanding as to what that award might be if we could reduce it to dollars, is that something that the parties are prepared to do under that hypothetical or would I be giving Judge Buchwald, should you be unable to agree, the added burden of having to deal with the amount of the contempt award?

MR. MORAG: Certainly, Barclays would be willing to have that meet and confer and try to agree an amount to date or to whatever point in time. Our position is that these attorney's fees are continuing and whether they continue through the District Court level, through the Second Circuit, that's someone else's issue, but the point is that in terms of what's been incurred to date, we would hope to achieve an agreement on a number that would be part of a judgment that Your Honor would enter that would be then final for purposes of appeal and then she would simply deal with the merits of the issues.

And if we couldn't do that, I don't know that we would be -- I don't know that we would be saddling her; they

might come back to you.

THE COURT: Let me tell you what I'd like to consider procedurally, and I don't want to jump too far ahead of where we are now, but assuming for the sake of this discussion that I were to agree with you that you're entitled to sanctions, contempt sanctions in this instance, I will either assess that or the parties will agree and, in effect, stipulate to that, so the matter that goes up on appeal is complete.

MR. MORAG: Right.

THE COURT: It seems to me that it becomes procedurally awkward for that to be a loose end that the District Court might then have to address.

MR. MORAG: We agree completely, Your Honor.

And again, one of the things that we said in our motion, and they didn't object in terms of the procedure is you tell us the date as of when the attorney's fees start and we go try to work it out. That's what we were hoping to -- that's why we teed up for today the issue of the entitlement and the date.

THE COURT: Now, let me express another concern that occurs to me as we're having this conversation. This is an award that by your own characterization of it has the potential of growing over time because your approximate three-million dollar claim for attorney's fees associated

with defending this litigation arguably may grow by a factor of 50 percent or more -- I'm just being completely hypothetical in saying that -- so that instead a three-million-dollar award, maybe over time, depending on outcome, it might be four and a half or five million dollars, particularly if it ends up going to the Circuit.

And here's the policy concern that I have, which I'm going to address, in effect, by granting you your contempt sanctions in the Bankruptcy Court with the understanding that they may grow, that becomes something of a weapon in your hands because it provides a strong disincentive for FirstBank to pursue its subjective good faith belief that it has a meritorious, even though you don't think they have a meritorious case, and I don't think they have a meritorious case, because my ruling makes that clear.

As a matter of jurisprudence in this district, do you think it is inappropriate policy outcome for there to be this kind of strong disincentive that applies to FirstBank under these circumstances? That's a soft ball.

MR. MORAG: I do believe there should be the incentive to comply with the injunction, and they've, again, done nothing in these papers to suggest any respect for this injunction. If they want to -- Your Honor doesn't have to make findings, with respect to things that haven't happened

yet in terms of arguments before the District Court, let alone the Circuit Court. It could be up to those courts to decide, whether A, they affirm, and B, whether on-going contempt for the period of time that the case was before them is appropriate.

So I think it's really an issue for others, potentially, to make. We are in the situation where we know that they want to continue. Remember, one of our last clear chance letters was right before the summary judgment, which said you now have all the discovery. There's nothing more you could need. We will agree to every party bears its own costs if you dismiss this case with prejudice and they said no.

So they've had the opportunity to cut the -- to stop the meter running at any number of points and I think you should decide as to what's been before you, let Judge Buchwald decide as to fees incurred in the District Court, and if they go to the Second Circuit, the Second Circuit is well-able to decide that issue and direct the District Court to do one thing or the other.

THE COURT: Now, I'm not paying close attention to Barclays' profits and losses, but I'm assuming that Barclays is doing just fine, or at least doing well enough. Barclays doesn't need the three million dollars. I'm sure it would be happy to have the three million dollars, but in some

respects, as an institution, it is not necessarily the most sympathetic party to request this kind of sanction.

My interpretation of your motion is that you are seeking to police in an orderly and disciplined way, the protections afforded to you under the sale order that was entered five years ago, and that in some respects, this is not just about FirstBank, but about laying down a marker to point out that the sale order is important to your client and needs to be strictly construed and enforced.

Do I understand that correctly?

MR. MORAG: Absolutely, Your Honor.

That is the motivation. We are not -- we have yet time before the running of statutes and limitations. There are hundreds, if not thousands, of creditors out there who could make an argument like FirstBank if they chose to do so and would be encouraged, perhaps, to do so if there is no consequence to them, other than what they want to spend on a lawyer to bring the claim.

And I think that in this circumstance we have simply, just as was the position with respect to the Rule 60 and the importance of finality here, this was a situation where, again, it would be one thing -- it would be one thing if this action were brought in the middle -- towards the end of September, 2008, when you had the fog of Lehman week. But this is not the fog of the month or the year of Lehman.

This was a suit brought 15 months afterwards that they could have -- that they had another two years to drop at any point in time without any consequence to them once they saw the evidence, once they saw that it was all confirmatory.

And I think in that circumstance there does need to be some sort of statement by the Court that precisely as said in the summary judgment decision, the injunction is a critical element to a 363 sale. It will affect Barclays' ability or interest in bidding for assets out of the next bankruptcy if we know that there's going to be a potential for millions of dollars of litigation over something that really is supposed to be not pursued against the buyer at all because -- specifically because there are these remedies against Lehman. There was nothing wrong with an action against the estate for the proceeds. If their theories were right, that would have given them 100 cents on the dollar. It didn't give them the right to sue Barclays and do that, as they claim their customer claim is, which is, of course, a totally different animal requiring them to make a totally different showing.

But the point is that they had a remedy and they're only here because they were so stubborn in terms of not pursuing the claim against the -- not filing a proof of claim against their contractual counterparty for the return of contractual collateral. Not filing a proof of claim

against LBHI for not being the guarantor of their counterparty and contractual collateral.

This will all -- they need to hear and the rest of the community needs to hear that this is not how sale orders should be treated because it risks too much undermining of their finality and their protections for the buyer and the creditors of the estate that's selling and that's precisely what's at state here. Because, again, not one penny in this litigation did we spend because we wanted to. At every time we tried to avoid any additional costs -- you don't need those depositions; are you sure this is all for your account; are you sure that you want to take those additional depositions. We've spent only what we've been forced to by this action; this is not a profit-making enterprise. And so in those circumstances, we think it entirely appropriate.

And we've been, obviously, as I've said, we've had reasons why not to pursue in Evergreen Solar and we hopefully will never have this issue again. But that doesn't change where we are. It doesn't change the options that they had open to them. This isn't some sort of gotcha. This has been going on for four or five years with their eyes wide open, and their refusal to consider the possibility that they've actually wrong on the law and the facts. That's the only explanation for this.

And lastly, I just want to leave you with one

point that comes from the Second Circuit's decision that we've cited to you, the Weber case, it's the May 2013, Second Circuit decision on the automatic stay, which they don't contest that the law in the automatic stay for a willful violation is similar to the standard for a contempt of a sale order injunction or a discharge injunction. And that case is important because in that case what you had on the subjective good faith point is even better than perhaps FirstBank's position and it ties into this argument that they relied on Judge Daniels never mentioning the word contempt.

But in there, what you had is a secured creditor, as you know, who was following Northern District of New York precedent, an 11-year-old precedent that said that if you are in possession of a debtor's automobile, you don't have to return it after the filing until there's a turnover order. That, in fact, was the Alberto case that Judge Heard, at the time, reversed a finding of violation of the automatic stay and this creditor did the exact same thing that they had been doing in the Northern District for 12 years and it goes up to the Second Circuit and the Second Circuit says SEFCU, that's the secured creditor, asserts that even if its actions violated section 362, it's violation was not quote, "willful," closed quote, within the meaning of 362(k) and, therefore, the Court may not require

it to pay Weber's damages, costs or attorney's fees or to impose any sanction.

SEFCU asserts primarily that because it relied in good faith on the Alberto decision and the rule and custom of the Northern District of New York, any violation that it committed should not be deemed willful under section 362(k) and the Second Circuit explicitly rejected that argument.

Litigants to get to rely on courts unless they specifically ask the Court the question and gotten an answer, and this is exactly what they're trying to do with Judge Daniels' partial denial of the motion to dismiss. It is inappropriate and it just has no support, certainly not after the SEFCU decision in the Second Circuit.

I'll reserve my time to respond.

THE COURT: Fine, thank you.

MR. MITCHELL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. MITCHELL: Jeffrey Mitchell, from Dickstein Shapiro.

I want to start by making something clear to the Court from the outset. We respect the judicial process. We lost the summary judgment motion. We understand what the Court's decision is and we understand why we lost, based on the Court's decision. That was obviously always a risk of

any litigation, Plaintiff and Defendant, there's always a risk of losing a case. That does mean the case is not brought in good faith. It does not mean that the arguments made by counsel are not made in good faith, and it doesn't mean that the claims asserted by a party are not claims that are not asserted in good faith.

What we have here is something completely different: This is a contempt motion. And it's not for violation of the automatic stay; it's for the violation of a court order, the sale order, and the standards that apply to contempt are what apply here, the standards of good faith, the standards of assertions of claims in good faith and the record of this case.

But first, what Barclays looks to hold FirstBank in contempt for is pursuit of the claims made by FirstBank in this case through discovery and judgment. Precisely the same claims the District Court said, when it denied Barclays' motion to dismiss, that FirstBank had a right to pursue in this case, not like the Weber case where there's precedent; it's in this case.

Now, this is an unusual case, I think, in connection with the Lehman bankruptcy to the following extent. Your Honor, this case came to you from the District Court on referral, so it has embedded in it a pre-existing decision of the District Court, with respect to the claims.

Most significant is that Barclays did claim before Judge Daniels and did provided copies to Judge Daniels, of the sale order, schedule A, and the clarification letter and argued to Judge Daniels in point one of its brief to dismiss that this case was enjoined, and it used the word enjoined.

The District Court found otherwise. Now, obviously, if the District Court had believed, based upon review of the documents that the case was clearly enjoined, it never would have allowed the case to proceed; it would have dismissed. Now, the issue after denial of the motions to dismiss is whether the sale order applied to the FirstBank collateral and that issue is presented to this case following the motion to dismiss as a question of fact and law briefed fully to the Court, and we have a decision on a summary judgment motion of May, 2013.

So the open issue that left the District Court in an order on the record in this case has now been resolved by the Court's summary judgment decision. There were four court appearances in this case. Throughout the entire -- I heard this morning you were talking about cases in which a lot of people, you know, cases are under the radar or over the radar. This was one of those cases, I would say the Court probably knew nothing about until we filed our motions for summary judgment, notwithstanding that we did have one appearance here. We had two appearances in the District

Court; one on the motion to dismiss and one on the referral motion, and two appearance in this court, one in November, 2010, and the other in January, 2013.

The summary judgment is decided in May, 2013, and I would suggest to the Court that if that is the operative date on which there is now a definitive rule to which the District Court said FirstBank was entitled as to what this Court's interpretation is of the sale order, the clarification letter, the schedule A, as it applies specifically to FirstBank's collateral. This issue, as it related specifically to FirstBank's collateral, had never been previously addressed in this court.

Now, Barclays looks to distinguish the District Court decision by saying it was not on the merits, but it is on the merits to the following extent. Judge Daniels didn't rule against Barclays based solely on the allegations in the complaint. He had before him the sale order, the asset purchase agreement, the clarification letter, and schedule A. It is clear from the transcript that he relied on those transcripts as well, and did not believe that facially, it was clear that it was intended that FirstBank's securities were purchased assets.

And on reply in that case, Barclays had provided schedule A and argued to the Court that the assets were listed on schedule A. So his decision is more than simply

taking the allegations of the client as true, he found that pursuit of FirstBank's claims to judgment was not barred expressly by the language of the sale order and that there needed to be a determination on the facts as to whether FirstBank's securities in particular were purchased assets. This was not a 60(b) case in FirstBank's estimation was FirstBank was not looking to subvert the sale order; FirstBank was looking for a determination whether or not the sale order applied because if these were not purchased assets, then the sale order did not apply to them; that was the own issue for the case.

So I ask the Court, how then, in the face of a decision in this case that pursuit of this case is authorized, can that pursuit ultimately result in a contempt citation against the party whose claim was not dismissed? The claims that survived dismissal were precisely the claims that this Court ruled upon.

No different, Your Honor, than presumably -- the case comes in a strange posture only because the motion to dismiss was decided by the District Court by consent of the parties before referral, but it would be akin to this Court if Your Honor had issued the ruling saying that the case can proceed and then later holding a party in contempt for proceeding with a claim that you did not dismiss because it's part of the docket of this case, in the scheme of the

case.

THE COURT: Let's think about that for a second because that's an interesting -- it's an interesting structural anomaly. We have Judge Daniels in the District Court, in effect, giving you what you would call a green light to proceed with litigation. You proceed with the litigation, but you do so knowing that Barclays' legal position is that you are skirting a contempt motion, in fact, you are going to be held accountable for pursuing that litigation because it is their legal position -- and they tell you that -- that the sale order applies to these assets as purchased assets. It enjoins the action that you're pursuing and that notwithstanding the fact that the motion to dismiss was not granted in full, that you're proceeding at your own risk.

Is it your position that the decision made by the District Court in ruling on Barclays' motion to dismiss immunizes you from the present contempt claim?

MR. MITCHELL: Yes, Your Honor.

And if it was to change, it would have changed here, and let me explain to you what I mean. We have a motion to dismiss directed specifically at these assets and the claim that these assets were not purchased under the operative documents, pursuant to which Barclays claims protection. The District Court possessed of those

documents, reviews them, understands the claims of the parties -- I have the transcript here, we presented it as an exhibit from Judge Daniels. It's clear that he looked at the face of those documents and said we need to have a determination whether or not they were purchased assets, notwithstanding the fact that they were on schedule A and notwithstanding the fact that there's a claim that the sale order covers it.

And keep in mind that the sale order itself does not say that the FirstBank securities are purchased assets. Even the asset purchase agreement doesn't say that the FirstBank's securities are purchased assets; that's only in the clarification letter which is the one document, because it came up with the Court issued its 60(b) decision -- when this Court issued the 60(b) decision, Your Honor even commented on it, that Your Honor was unaware of many things that were in that clarification letter.

So this case really is, through the sale order down to the clarification letter, a question of interpretation of how that was supposed to work in the clarification letter. And the District Court said, looking at the face of those documents, that we need a determination on that. This Court has now made that determination in May of this year, solidifying the issue of this Court's view of how the sale order worked, vis-a-vis, the FirstBank's

securities. That is what we were entitled to in this case, pursuant to the decision of the District Court, and can't be held in contempt for that as a matter of law.

There is no case, no case that we found we reported anywhere in the United States, where a party survived the motion to dismiss and was later held in contempt of any order of a court for pursuing the case that was not dismissed, and there are many orders at issue. There are injunctions in other circuits -- this is effectively an injunction -- and there injunction cases all over and there are cases which question the scope of an injunction, the extent to which an injunction enjoins certain conduct, and there are cases where that dispute is resolved by a Court clarifying what it is that is enjoined and that suit itself, surviving motions to dismiss, cannot result in sanctions because you're authorized to get that decision.

As this case progresses facts are developed. We believe facts were developed that this Court was unaware of. We did not know what Your Honor's view would be of those facts when they were presented to you and we obviously know what Your Honor's view of those facts are in light of your decision, but we believe that once the District Court issued its decision saying the case could proceed, that at that point forward, until there is some either change in the

order or a final decision of this court clarifying what it is or how it applied to the FirstBank collateral, we can't be held in contempt for getting that decision.

Now, I go a step further, interestingly in the procedural posture which is curious in this case, perhaps, in a way, because at the same time that Barclays filed its motion to dismiss, it also sent a letter to Judge Daniels asking that the case be referred to the Bankruptcy Court. And the way it worked out is that we got to Judge Daniels first on the motion to dismiss before the referral decision and Mr. Morag at the outset -- if you look at the transcript -- at the outset of that argument on the summary judgment motion, Mr. Morag is asked by Judge Daniels about the referral request and Mr. Morag says, clearly you have jurisdiction, Your Honor, and we have no problem with you deciding the motion to dismiss.

Upon the conclusion of the argument and the decision by Judge Daniels, Mr. Morag then says, of course, the Bankruptcy Court will then be bound by your decision and it's a plain statement by Mr. Morag, so we know now that the case becomes governed by, at the consent of Barclays, the decision of Judge Daniels.

The first act happens or the first event that happens when we come back, we then have the referral motion. The matter is now referred to this court and we come to this

court for a scheduling conference, so that's in November, 2010. Now, the posture again is -- this is -- this is where I think the fatal law in the logic of the argument of contempt in this circumstance, we now are in front of the Court that Barclays not only belonged in, but the judge who signed the sale order, and we come for a conference to set a scheduling order. Nowhere in that conference does Barclays raise the issue of contempt -- if you take their argument, Mr. Morag said we were in contempt the moment we filed the lawsuit in December, 2009.

So now we're in front of the Court in November of 2010 and it's now out of Judge Daniels' court. The motion to dismiss has been denied, but the judge who signed the sale order is now, you know, running a conference at the beginning of the case. Does Mr. Morag say that FirstBank is standing before Your Honor in contempt of this Court and in contempt of the sale order? Does Mr. Morag ask for a ruling from this Court -- you know they're proceeding in this case in complete violation of Your Honor's order?

Not a word. We agreed with discovery schedule. Your Honor inquired of the parties -- and the transcript of that, we've provided a copy of that transcript -- you inquired of the parties whether ADR, mediation, something might be beneficial. Both parties responded to Your Honor that it was premature, and at the conclusion, Mr. Morag also

said that he believed that he needed discovery as well for purpose of the case plainly in the transcript. We then don't appear before Your Honor, again, until we argue the summary judgment motion in January, 2013.

Now, if something changed -- let's take the Evergreen Solar decision -- obviously -- I've been practicing law for 30 years, so I've had many adversaries and many adversaries have made many threats against me over many years on a variety of cases; your case has no merit; your case is no good. There are ways to deal with that. In fact, the threatening letters that Mr. Morag always threatened that he was going to take prompt action on whatever it was that he was threatening and then he never took any action. He just sent the letters -- it said clearly in the letters that I'm going to take prompt action and they don't do anything.

So let's take the Evergreen Solar decision, let's assume for the moment -- and I said that the posture of the case is different because Evergreen Solar is a case to dismiss. They did put in a footnote that they reserved the right to seek sanctions in their brief in the Evergreen Solar case, but did not pursue them. But the Evergreen Solar case is a motion to dismiss on the same -- counsel said it's the same day, I don't recall the same day -- but clearly around the same time as Your Honor's 60(b) decision,

which we found things in Your Honor's 60(b) decision that we thought were beneficial to our case and I can explain that.

But nonetheless -- and that was the nature of our conversation with each other. In Your Honor's 60(b) decision, you reference collateral, and there's an assumption in your decision towards the end that if collateral transferred to Barclays, presumably it transferred along with the obligation, and we read that to apply, or at least we thought that that certainly gave us hope in connection with our case with you in establishing the facts of this case that you might rule similarly in our case because ours was also collateral.

I'm not quibbling with the Court's decision on the summary judgment motion, I'm simply saying is what our thought process was and why it is not bad faith. But let's assume for the moment that Barclays really believed that the Evergreen Solar decision changed everything. There is a way to bring that before Your Honor, which is to renew the motion to dismiss based on new law. Upon renewal, the Court could consider or reconsider the motion to dismiss, in which event this Court could have acted upon, changed or made a different ruling than Judge Daniels.

But Barclays was satisfied to leave Judge Daniels' as the only operative decision governing the future progress of this case. They never brought that to Your Honor. They

never at any time raised the issue of contempt with Your Honor and this is another interesting fact, and what I find about Barclays' motion for contempt is it's a creative attempt, in my opinion, to get around the fact that you don't get costs and attorney's fees ordinarily in a litigation, its use of contempt as a vehicle to do it.

But think about the notion of injunctions. An injunction enjoins a party from doing something. All injunctions do, sale order injunctions, any kind of injunction. Barclays claims to be a party entitled to the absolute, unfettered clear right to an injunction based upon the sale order and argues that signs 2009, that FirstBank has been in violation of that injunction. Not only that, we're in front of the very judge who signed the order that contains the injunction.

I have never seen a case in my years where somebody's arguably in violation of an injunction and the case is pending before the judge who signed the injunction, where for three and a half years the party never says a word to the judge. Your Honor, we have the benefit of an injunction here, please enforce it. Enjoined -- they're not allowed to pursue the case.

And they would say, well, they were proceeding at their own risk. Think about what they're saying -- about what they're not saying is Barclays voluntarily, for no good

reason, took the risk of loss in this case rather than go to Your Honor and say, Your Honor, there is an injunction that enjoins prosecution of this case. Because there's always a risk that can lose, why would you ever subject yourself to the possibility of losing a dispute if the claims or the case in which that dispute is brought, why would you ever take that risk if it doesn't have to be brought at all and it's completely enjoined. That makes no sense.

THE COURT: Are you suggesting by that argument that Barclays, in effect, induced you into believing that there was no material risk associated with on-going prosecution of the litigation?

MR. MITCHELL: No, I'm suggesting that Barclays knew what the import of what Judge Daniels' order was. Barclays knew and understood that the case was not enjoined, and what Barclays was doing was simply saving its motion for contempt if it won.

THE COURT: Let me parse what you just said a little bit finer. You're saying that it was the decision of Judge Daniels, with respect to the motion to dismiss, that when read together with the sale order, in effect, suspends the injunction of the sale order? I'm trying to understand what you're saying.

MR. MITCHELL: What the Court is saying is that it's a question of fact whether or not the sale order

applies to your assets and that question of fact is a question of fact that is to be resolved in this case. Because based upon the -- he's not saying that -- he's not making any decision with respect to what the sale order says, he's simply saying that with respect to these particular assets, based upon the plain language of the documents, I cannot tell from the face of these documents whether or not they are purchased assets.

And he heard the arguments of both sides, the allegations of the complaint -- or the allegations that we pursued to judgment on both sides, including the answer, and that was what -- so, the case is to determine whether the scope of the sale order is broad enough to encompass or whether the -- whether -- let me say it differently.

The way he used an example, if you read his transcript, his question was, what did you purchase, and he used the question of dolls and balls. And he said let's say I bought a box of -- and I don't remember if he used dolls or balls -- but the example was I bought a box of dolls from you and there was a ball in the box, do I own the ball? And then -- or -- so he viewed the question as one whether in reading the documents, did you buy everything in the box or did you simply buy a box of dolls?

And the issue was, in looking at that, what does purchased assets mean; that was the critical component. And

does the FirstBank -- excuse me -- does FirstBank collateral, does that qualify as a purchased asset? That was -- and if you look at the transcript, he goes through that example of the balls and the dolls. He had another one, if I sold you a car and there was something in the trunk, and I only told you the car -- and that's how he was viewing what this case was.

And the determination of this Court on the summary judgment motion is that it was intended, that it was -- I can't use the box of dolls and balls analogy necessarily, because you didn't use that, but essentially whatever it was that Barclays bought included these assets and this Court's determination was based principally on the fact that they were used in the repo, and that's how -- you know, it's not as if the Court said we don't -- I don't see where, you know, ISDAs were excluded or all the other things. We fall down to the, it was used in the repo and that's the reason.

That was an issue that was an issue in the motion to dismiss, which was, was it an asset of the estate; was it something that was included in the asset sale? And the Judge -- Judge Daniels said that we were entitled to discovery and a ruling on the merits.

So I would say to Your Honor, what we have now is subsequent to May of 2013 with Your Honor's definitive ruling under the sale order and the operative documents

incorporated by reference, that we now have this Court's interpretation, absent reversal, absent change. Anything we would do in derogation of that order clearly would be contempt because we now have Your Honor's specific ruling with respect to our collateral.

But until that ruling is made, and nothing's stopped Barclays from seeking that ruling at any time, but until that ruling is made, we don't have the decision to which Judge Daniels said we were entitled. So, the sale order is modified to a degree, no in its enforcement as against the world, but in connection with this litigation to give us the ability and authority to proceed with your claims to judgment.

It's not a violation of the stay case; it's a lawsuit. We didn't engage in self-help, so it's not one of those things -- the case, the Weber case, which is different in many respects, one, it's a violation of the automatic stay, A; B, it's an individual, as opposed to a company, and the standard for contempt for violation of the automatic stay, with respect to an individual is lower. Good faith does not come into play and that's a significant distinction of the Weber case.

There are -- there is no close -- there is no case that Barclays has cited that in the case itself, in any case, where in the case itself the motion to dismiss is

denied by the Court, the case proceeds, and pursuit of that particular case is then contempt. There no case. There no case in the United States that's ever said such a thing. The closest they have is in Weber. They relied on precedent somewhere else; that's completely distinguishable.

Now, if you look at the -- Barclays case is really -- they contend that because they won the summary judgment motion, ipso facto, FirstBank was in contempt from the moment it first brought the case and, therefore, Barclays is entitled to retroactive application of your summary judgment decision back to the beginning of the case; that's really their argument and I don't think they deny that.

Even if you look at their timeline -- even in the timeline they handed to Your Honor, there's no mention of the timeline of Judge Daniels' denial of the motion to dismiss; it's not in their timeline, which I think is an interesting omission. It's not there. But they do have the referral order. They just ignore the -- as if that doesn't mean anything.

I don't see how a motion to dismiss or the denial of a motion to dismiss by a federal district judge in the face of these documents can have no meaning and a party could be in contempt subsequent to that for proceeding with a case that is not dismissed.

Now, I think if you look at this, the linchpin of Barclays' position is that the motion to dismiss did not resolve the issue of whether or not FirstBank could ultimately be held in contempt later down the road for proceeding with its claims. And it's simply argued, is because FirstBank didn't ask for such a ruling, none should be implied. I don't believe that's true. As I said before, FirstBank -- Barclays did not move just on the pleadings.

I'm going to read to you from Judge Daniels', you know, the transcript, page 97, starting at line 17.

He says quote, "I think the protections of the UCC may apply in this case, but I believe that it is a factual determination that I cannot resolve on the pleadings alone or on the pleadings and the documents that are incorporated by reference, including schedule A, and an interpretation of this stage of the proceeding of whether schedule A clearly excludes or defines or includes this property as assets purchased and approved included in the approval granted by the Bankruptcy Court and defined as purchased as part of the purchased assets."

So it's clear from the transcript that Judge Daniels considered far more than the allegations of the complaint. He was reading the operative documents and he couldn't tell, facially, himself whether it was enjoined, and he did not at that point rule. Obviously, no district

judge is going to allow enjoined claims to proceed.

I would say, Your Honor, the motion to dismiss and the argument on the motion to dismiss that the claimed were enjoined was precisely the motion that Barclays made; that was point one in their brief, and that shouldn't be missed because there's no way that Judge Daniels could have missed it, and no federal district judge is going to allow enjoined claims to go forward.

So the denial of the motion to dismiss has to be a finding that FirstBank was entitled to proceed with its case to a decision on the merits, what else could it be? Whether its securities were purchased assets under the APA and clarification letter, documents that were extrinsic to the sale order. That was the ultimate issue to be decided in this case which Your Honor has now decided.

I mentioned before, but it's important to expand a little bit, Barclays voluntarily submitted its motion to dismiss to the District Court. It could have done it the other way. Judge Daniels gave Barclays the option to tee up whichever motion first. He would have considered the referral motion before the decision -- before he decided the motion to dismiss, but Barclays told the District Court it was fine for the District Court to hear the motion to dismiss. And he said, Mr. Morag said there's no question that he jurisdiction to decide it. So we now have an order

that comes down to this court that guides the case from that point forward.

THE COURT: Let me ask you a question, it's a question in two parts. Sometimes Courts, myself included, deny motions to dismiss because you just don't know. You have subjective uncertainty as to whether or not the claims are good claims or bad claims, and so more often than not, the benefit of the doubt goes to the Plaintiff, because to grant the motion to dismiss knocks the Plaintiff out of court.

If the motion to dismiss is based upon that kind of standard, it's really not a green light, it's an amber light. That's question one, I'd like you to comment on that.

And question two relates to what happens next in this proceeding, do you acknowledge that as of May 10, 2013, all further litigation activity of FirstBank is subject to on-going sanctions regardless of what happens prior to that date?

MR. MITCHELL: Okay. Let me first deal with the amber light. You do not violate the law for passing an amber light; you proceed with caution. We did outline in our brief to the Court the facts that we adduced during discovery that led us to believe in good faith that we had a claim, based on facts Your Honor, we thought had been

previously unaware of, based upon the record that we observed in this bankruptcy proceeding, that you could rule in our favor.

I understand completely having stood before you on the oral argument, and I also recall the oral argument. I understand Your Honor's view on that, but I was not -- my only appearance before Your Honor prior to that argument was at a very uncontentious preliminary conference in November of 2010, where even Your Honor suggested potentially ADR or mediation. So there was no indication, and Your Honor said -- even at the conference, Your Honor said that, you know, you don't have great familiarity with the case, but you understood the claims. There was nothing in at least that appearance, the only other appearance that we had prior to the summary judgment argument, to lead us to believe that our case would receive the decision that it did. I understand why it did, but I'm not -- I understand that.

So it's not that we're on notice that the Court is saying that we're proceeding with an amber light. There's no light at all. Even counsel was saying in the transcript we all need discovery, so that's certainly not amber. We believe --

THE COURT: Let's change the metaphor slightly.

MR. MITCHELL: Okay.

THE COURT: Assume it's an uncontrolled

intersection. There are no stop signs. There are no traffic lights, but it's an intersection and you're approaching it, and Barclays is there as a crossing guard and saying to you that if you enter this intersection, we're holding you responsible for contempt because we're putting you on notice that now you're on-going progress will, in fact, be in contempt of the sale order and we're a purchaser of assets in the biggest bankruptcy in history and we are entitled to be protected by that order, so you're proceeding at your own risk. That's essentially what happened here.

MR. MITCHELL: I would temper that a bit. I think they made that argument to -- I believe they made that argument to Judge Daniels, and I believe that Judge Daniels, when presented with that argument, said otherwise. So I believe that what happens is -- see, I don't believe that that's an uncontrolled intersection. I would quibble with the Court that once we had a District Court order, prior to referral, that that's an uncontrolled intersection. At some level of control, somebody's looked at the case and made a determination, and that determination was that the case can proceed.

In order to turn that into an amber light or a red light, it shouldn't be the ordinary colloquy between counsel that exists in every case where lawyers represent clients and advocate their clients' positions to each other. Maybe

make threats -- there are a series of rules that apply to that.

If the claim is that the case is no longer viable because something changed to make Judge Daniels' decision no longer controlling, then that's something that needs to come to this court, be brought to the attention of this Court, and this Court could then issue a warning to FirstBank that you now proceed at your peril from this point forward.

But lawyers threatening each other with, you proceed at your peril, I'm going to act promptly if you don't withdraw your claim, and then they don't file anything -- if you read the letter, it says we're going to act promptly -- and they don't do anything, we certainly expected Barclays to do something and to bring it before Your Honor and we would have been before Your Honor to discuss it. They did nothing.

So I don't think anything happened to change what I would say is a controlled intersection giving us the authority to proceed. Barclays took no steps to stop that control that had been turned I would say green -- I don't even think it's amber, it's green -- I don't think that a lawyer writing a letter to another lawyer has the authority to say what a judge said or didn't say -- only judges can say what judges say and only judges can interpret their own orders, and that didn't happen here.

So I think -- and there were certainly procedures to do that. I can think of two very easily -- and certainly the easiest one certainly would be a motion to renew the motion to dismiss. That's certainly easy. That's certainly teeing up the issue of whether or not we're proceeding at our peril by conference or otherwise. It could have been: It wasn't.

THE COURT: Let me ask you a slight variation of the same hypothetical. Let's assume for the sake of discussion that you believe subjectively that Judge Daniels' decision, with respect to the motion to dismiss, constitutes permission for you to proceed, but let's also assume, because I believe this is true, that you are provided with a copy of schedule A that highlights the 20 positions in question and that when read in conjunction with the clarification letter, leads a reasonably prudent lawyer to conclude that there is a risk of contempt sanctions in proceeding with the litigation recognizing that claim by Barclays.

Does the fact that counsel has the ability to draw its own legal conclusion, that there is an appreciable risk of contempt sanctions for a willful violation of the sale order change anything?

MR. MITCHELL: I have to -- I'm not sure -- I have to clarify a fact here because prior to the argument before

Judge Daniels, schedule A was provided to both FirstBank and Judge Daniels and we -- and the content of schedule A was part of the motion to dismiss hearing. So in your hypothetical, Your Honor, I'm not clear exactly why counsel would believe that Judge Daniels didn't consider that issue in finding that the case is not enjoined from proceeding know that the securities were listed on schedule A. I'm not following the Court's logic.

THE COURT: Maybe I didn't make it clear.

I'm drawing a distinction between treating the decision on the motion to dismiss as permission and couple's independent obligation to determine whether or not it's safe to proceed.

MR. MITCHELL: Unless I'm missing something, I believe that's a separate -- there's separate rules on that, which I think what Your Honor is saying is, does there reach a point where there's no longer a good faith belief in your claim? Is that the thrust of whatever is saying?

THE COURT: No, I think you may have a good faith belief in your claim and you may believe that it's worth pursuing the claim and you may believe it's consistent with zealous advocacy, but you also believe there's an appreciable risk that you're going to be attacked with sanctions because there's a risk that you're going to be found to be violating the sale order.

And we're particularly concerned here because we're talking about a bankruptcy sale order that's entitled to a great deal of cross-border respect. We're talking about the largest sale in the history of bankruptcy, and if purchasers can't be secure in their purchase decision, those orders aren't very good.

MR. MITCHELL: I understand.

Your Honor, I would say to you that we took comfort in the decision of Judge Daniels on the motion to dismiss and proceeded based upon that decision and we understood and interpreted that decision to authorize us, by court order, to proceed with this case to a determination on the merits unless something changed and nothing changed that order. It didn't subvert the sale order. It didn't challenge the authority of the Bankruptcy Court to issue the sale order.

It simply said, were our assets included. We had paper and documents and communications that led us to believe that I was sent to Barclays by mistake. So that is what the case was. We were simply trying to get our property back because we thought that it was sent in error. And it certainly came out in documents when we looked at the examiner's report. I even got it from depositions that there were assets that transferred by mistake that were sent back. So it's not that some assets -- everything that

Barclays received they didn't keep. There's deposition testimony that there was a period of time when they were inventorying what they had and sending things back and keeping other things and that's how that proceeded.

So with respect to the clarity of the position, I would say to the Court, you know, we're a stranger to the operative documents and obviously the case proceeded in that very quickly and there were other things at play here besides protecting or necessarily considering all of the permutations of the -- of what was being transferred because speed was important.

But here we are now, it's five years later, the principles to that document, Barclays and Lehman are still litigating with each other over what the -- what the clarification letter means. It's still in the Second Circuit. So here are the parties that should know exactly -- because what is happening here is in the context of this contempt proceeding, it's almost as if the standard to which FirstBank is being held, with the benefit of a District Court order saying that the case can proceed, is higher than the parties what actually negotiated that document themselves and they're still litigating over what it means, and that's up in the Second Circuit.

So if the parties who sat around the table and negotiated with each other still can't decide five years

later what all the terms mean, I think that there is not, what I would call, the level of finality sufficient to say that our claim to determine, you know, our claim against Barclays' with respect to what we had, that that claim as to whether it was actually a purchase asset, is something that rises to the level of contempt.

On the record of this case -- because keep in mind this is about the record of this case -- it's before the Bankruptcy Court, but it's between two parties that are not in Bankruptcy Court. It's Barclays seeking the protection of a court order; it's the sale order, but it is a court order, that has been the subject of so much litigation and dispute over the last five years even between the principals of that document, that for FirstBank to have a definitive ruling from a Court, yes, your property was taken, a significant amount of our property -- Barclays -- maybe not for Barclays, but for FirstBank -- a significant amount of your property did disappear in the vacuum of what happened during that week.

FirstBank has shareholders. It reports to its shareholders. A definitive ruling that it was appropriately taken and that it does, in fact, belong to the party that is in possession of it is not an unreasonable thing to get in light of these circumstances. This Court had never considered, prior to our case, FirstBank's assets

specifically. It's not as if -- in the ordinary case you'd have, what, 60, 90 days, you'd have a considerable amount of time before you'd issue a sale order. You know, a lot of people would have the opportunity to come in and be heard. It's not a situation where FirstBank appeared before the Court and the Court made the decision.

Another one -- the other issue is the cases they cite which is those cases -- they've got a divorce case, I've forgot the names of some of these cases, but they cited a divorce case -- so the parties have being fighting with each other in court for a long period of time and then the wife went off and sued for something in another state. And the Court said, well, you've been in front of me before and I've made rulings before and you understand my rulings because you stood in the well of my court and heard those rulings.

That's not this case. This case, that never happened. So the only ruling that exists specifically, with respect to whether or not the FirstBank's securities are purchased assets, is Your Honor's decision to make.

Now, the second part of your question, Your Honor, was, do I -- what's my position with respect to from May forward on appeal. I don't think it's any different than any other case. Within the confines of the case, we have rights of appeal. I think you're Mr. Morag isn't it a

disincentive for me to make a ruling for them to pursue an appeal.

I think in the B of A case, by the way, and we cited it in a footnote of our papers, Your Honor declined because there was an appeal to consider the sanctions motion. You felt it was premature. You recognized that B of A -- and that's a violation of the automatic stay case -- again, not akin to this. So it's a much different -- it's a self-help case. This is not a self-help case.

And I think very important for the Court to remember that it's not a self-help case. There is a District Court decision that precedes this case being referred, but Your Honor said in that case, Mr. Morag said things that were outside of the record. I have no idea what happened after that. It's not in the record in this proceeding.

But what Your Honor said and what did happen in that case is Your Honor declined to consider the sanctions motion because Your Honor said that B of A has a right to appeal and it very well -- things may change on appeal. Even if the Court -- even if the District Court affirms the decision, there are things that could come out of an affirmance of a decision that might influence this Court on a sanctions motion.

THE COURT: Well, just for clarity of this record,

my best recollection of what happened there is that the parties met and conferred, avoided the need for a further hearing with regard for determining the sanctions. Reached an agreement as to what the sanctions would be. The appeal was taken to the District Court and while it was pending, and I believe even before briefing, the matter was settled.

MR. MITCHELL: Okay. Your Honor, the record available to us shows that Your Honor declined. Your Honor thought it was --

THE COURT: It's part of the oral history of the case.

MR. MITCHELL: Okay. I think it's -- you know, I think what's important, because we're talking about contempt, you know, we're not talking about contempt where it's automatic; it's contempt where is there -- was there a good faith basis for a party to do what it was the party was doing, that is alleged to be the act of contempt.

And I do not believe that it's possible to find a party in contempt for proceeding with a claim in the face of denial of a motion to dismiss. There is no authority anywhere that that could ever be contempt, whether it's in Bankruptcy Court, District Court, Circuit Court, anywhere, there's no authority for that and they do not cite any authority. And I'm sure, that Barclays with its three million dollars in legal fees and the amount of lawyers that

they put on their cases, if that case existed, they would have it, and it's not cited anywhere in the briefs.

Your Honor observed during oral argument -- I thought -- and I'm not trying to hold Your Honor to the statement, but I know, Your Honor, we had a long oral argument. I thought at oral argument that you at least accepted the notion that there was a good faith dispute between the parties about how the facts -- and there was a series of stipulated facts. Your Honor didn't have to make findings of fact because through the discovery process, counsel, to streamline the case for you, were able to stipulate to most of the operative facts.

THE COURT: Right.

MR. MITCHELL: That's not -- that doesn't mean that those facts were all known prior to discovery; it just simply means that we all heard the same thing and we agreed on what the facts were that were adduced during discovery.

Your decision and what you said at oral argument, I believe that's what Your Honor did with that decision, was to take the documents, the undisputed facts that the parties agreed to, and apply them to the circumstances of this case. And you believed, I thought, that we were at least arguing our position, vis-a-vis, the documents and the evidence to you in good faith.

Your Honor said at page 89 of the record, quote,

"There isn't much that in life that's really clear." So especially when parties have been involved in good faith litigation where the facts were largely stipulated, but the legal conclusions were diametrically opposite, it's not helpful for me to say that something is clear when the reality is that there's a good faith dispute as to what the right answer is. I completely agree with that statement of Your Honor.

THE COURT: Sounds like something I was saying to chastise you for arguing something was absolutely clear. But it may be that it came up at a different point in the transcript.

MR. MITCHELL: Yeah, I'm just -- all I'm suggesting to Your Honor is --

THE COURT: I think I remember that I did chastise you at one point for trying to argue that something was crystal clear, and I believe that's when I started going off and said, well, there's very little in life that's really that clear.

MR. MITCHELL: But even just taking that, I agree with Your Honor --

THE COURT: I had no idea that that would be quoted back to me.

MR. MITCHELL: I'm not looking to -- Your Honor, I'm simply stating -- look, I had -- I would say to you

until this litigation or this motion was brought on, I had no issue with the professionalism, with the decorum and with the manner in which Mr. Morag presented his case. We disagreed with each other on what the application of the facts should be to the operative documents. We had a District Court order that said we were entitled to a decision on the merits to determine whether we had purchased assets under the operative documents.

The contempt motion, in reading the briefing, especially the reply brief is so over the top. It takes bits and pieces, here and there, strings it together in what I think is intended to be the most egregious misrepresentation of the litigation that ensued in this case, that on a professional level, I was personally offended. That was not the nature of my relationship with Mr. Morag until that motion was filed.

Yes, he said you're wrong. Yes, he said we're going to sue you for sanctions. I said, fine, please bring it to Judge Peck. We had conversations about it. Please bring it to the Court. I'm happy to have you bring it to the Court, but if you don't bring it to the Court, we have the decision of Judge Daniels.

I really fundamentally believe that this is simply a creative attempt to retroactively apply your summary judgment decision in order to make it fit into what looks

like contempt, when in fact, on this record in this particular case it can't be contempt because there's no legal support for issuing an order of contempt for proceeding with a case that's not dismissed. The only way it could be contempt is if Judge Daniels had dismissed the case because it was enjoined by the sale order and then we had taken action in derogation of that order after that motion to dismiss was granted and that was not by way of appeal.

I think you have an absolute right as a litigant in this country to pursue a case without fear and risk of having to pay the other side's costs and attorney's fees unless there's a contractual provision or a statutory authority to do so. And I think the use of contempt in this circumstance, the retroactive application of a summary judgment decision resolving the open issue in a case that's allowed to proceed by denial of the motion to dismiss is just a very, very creative attempt to recover costs and attorney's fees. It's not to make a grand statement to anyone.

This case is limited to the facts of this particular case. It's a claim between two non-bankrupt parties over whether or not those assets were sold.

THE COURT: I think I've heard enough about your argument, but I'm going to ask you a question, so that means

I'm going to hear a little bit more. You said that this is the retroactive application of the Court's decision of May 10, but if we disregard the date of that decision, what I think Barclays is really saying is that they put you and your client on notice early in this process that the on-going pursuit of claims in this litigation in derogation of the sale order would result in a motion for contempt sanctions.

So the issue here is not just this Court's decision on a motion for summary judgment, but rather everything that led up to that which included notice to you not to proceed. So, in effect, we're living today not just with what happened in May, but everything that's on Barclays' timeline that was handed to me, in effect, all these signals given to FirstBank to say, don't tread on me, we're Barclays.

MR. MITCHELL: Was that a question -- may I respond?

The only way I can respond to Your Honor is that on a fully briefed and hotly disputed motion to dismiss, a District Court spoke and Mr. Morag thought Judge Daniels' decision was wrong. He always expressed to me that he thought it was wrong, and he disagreed with it. Anytime or everything he said thereafter was in the context of his belief that Judge Daniels' decision was not a controlling

decision in this case and my response to him consistently was, there is a decision in the District Court that allows that case to proceed and you made those arguments, specifically point one -- I think I have it here -- point one in their reply brief, "All securities transferred to Barclays were purchased assets and thus covered by the sale order which precludes this lawsuit." That was point one in their reply brief.

After -- and along with that, they provided schedule A. Along with that, they argued the operative documents and they argued all of that. So that particular argument is resolved by Judge Daniels. Not on the merits to the extent of the summary judgment, but the merits that apply as -- what I'll call loosely law of the case in this particular case -- that we have, not an amber light, but a green light to proceed with the case unless something changes. Mr. Morag's opinion about the correctness or lack of correctness of Judge Daniels' decision or his belief in his preference to have the case ultimately decided in this court because he felt, perhaps, that Your Honor might agree with him down the road, that doesn't change something that happened in this case by ruling of the Court where that issue was resolved.

So I would say, Your Honor, that putting somebody on notice that you disagree with a standing decision of a

district judge that guides the parties' conduct in that litigation is not meaningful. You need to do something else, and I come back to this because I think it's important, Your Honor, they succeeded immediately after this decision in having this case referred to Your Honor. I think it's important just to -- this is from the record, you know, we come to the pre-trial conference on November 17, 2010, right. Mr. Morag disagrees with the decision. We know that. Promptly has the case referred to Your Honor, so let's take their argument at face value.

I stood before Your Honor on November 10th -- November 17th, 2010, in contempt of court or my client stood in front of you in contempt of court. Not only contempt of the sale order, but clearly and willfully because that's necessary for a contempt citation, clearly and willfully in contempt of the sale order and I stand before the very judge who signed the sale order. Now, normally, obviously, denial of a motion to dismiss is not appealable and this was, and we're talking about among the most respected counsel in the world, Cleary, this was a very creative opportunity if Barclays chose to take it to effectively appeal Judge Daniels' decision to Your Honor or appeal to your own view of the sale order, yet at the conference, Barclays' Mr. Morag says nothing to you about standing before Your Honor in violation or in contempt of court. All we had was

pro forma scheduling discussions after that. Never came to Your Honor.

This is what happened -- this is what -- this is the statement -- this is the colloquy in the record --

THE COURT: I'm going to cut this off right now because I actually remember this conference that you refer to and if Mr. Morag or anybody else sitting in that chair was standing up where you're standing during the midst of adversary proceeding pre-trial said, Judge, I just want you to know something: We think that Judge Daniels made a terrible mistake, that this litigation shouldn't proceed, and that we want you, preemptively, to cut off everything in this case right now because we want to renew our motion to dismiss before you, I would think that somebody had lost their senses. That's simply not permissible conduct, but for the fact that you may have left to go to lunch, I had a similar sort of experience this morning just before the lunch break with respect to a pre-trial in which I cut off discussion fairly abruptly.

So I hear what you're saying. This is a unique set of facts and I think that I understand your position, but I also don't think that the Barclays' position is that Judge Daniels is a problem. Their position is that FirstBank is the problem.

MR. MITCHELL: I understand.

I agree with you, I think that is their position, but I think what the Court has to address is that there is in no case and no cited authority to this Court, any authority to hold a party in contempt for proceeding with a case that's not dismissed on a motion to dismiss. There is just no authority.

And I think that one thing Your Honor can take judicial notice of because Barclays has appeared before Your Honor many times: They're very well prepared; they research extremely thoroughly and they leave no stone unturned. If such a case existed, directly on point, I presume it would have been presented to this Court.

THE COURT: I'm sure you're right.

MR. MITCHELL: Thank you.

THE COURT: You I'm reminded of the old saying, beware of any adversary who compliments you.

MR. MORAG: Your Honor, very briefly.

With respect to the reasons why we didn't renew the motion, it's precisely as Your Honor said. When we wrote to FirstBank and said now that there's the Evergreen Solar case, let's go back to Judge Peck, this will be more efficient. If you're right; you're right, but if you're wrong, we'll all know now. The argument was this is law of the case. There is no legal basis for Judge Peck to rule on the exact same record that was before Judge Daniels.

And it is an interesting Article 3 question about what the relationship between Your Honor and the District Court that we did not think it was appropriate to burden you with the additional decision of having to decide whether you could decide that at this point. Every other case that we had seen involved the determination at the end of the matter who was right and who was wrong, and if the Plaintiff was wrong and, in fact, violated an injunction or an automatic stay or discharge injunction, that's when they found out whether they got sanctioned or not. The only point was to put FirstBank on notice that it was at risk. We had done that; that's undisputed.

There's one case that I think comes closest, if you will to this issue that Mr. Mitchell keeps saying there is no case. Obviously there was no case for lots of things Your Honor heard today; this is one of the things that there is no case directly on point.

THE COURT: I specialize in cases for which there are no cases.

MR. MORAG: Right.

But we do have to think about first principles and what a motion to dismiss is. I don't know that we're going to be able to convince you, but you certainly shouldn't be convinced by Mr. Mitchell. You have the transcript of the oral argument on the motion to dismiss. You have the

briefs. You also have, and I'll just refer you to it, it's Exhibit 78 to my affidavit, page 12 where the judge specifically said, "I can't consider some of these documents on a motion to dismiss." That doesn't mean that have you license to go forward and there are no consequences to you if you turn out to be wrong.

All we're saying is that Judge Daniels did not give any dispensation, any get-out-of-contempt-free card. What he said was I can't resolve this on this record, just like Your Honor couldn't resolve in Bank of America whether the party had a right to engage in a setoff before you heard all of the evidence. But at the same time, you heard the evidence, you didn't say, okay, so if Bank of America from here on out continues to adhere to its position, then there will be sanctions. It's always looking backward.

Every single case that we cited in our papers involves a determination made at the end. The Plaintiff is wrong or in violation of an injunction and it is sanctionable, it is contemptuous. You don't go -- you don't look from May 10, 2013, forward. You look from whatever date is appropriate for Your Honor to decide that they willfully acted.

What is this business about they didn't engage in self-help and that's what the distinguishing feature of the automatic stay case is. They didn't brief any of that, but

the point is, what is filing a lawsuit? Who did that? They did. That is the one -- that is the thing that is enjoined in this injunction. That is self-help in the sense that they, in the face of an injunction, took the very act that is enjoined, not to file an action against the estate for the proceeds or even a declaratory judgment action. Is this purchased asset -- is this security a purchased asset because we do not want to violate the injunction. They didn't do that and that's what we are saying are the opportunities that they had.

I'm -- simply on the standard, this good faith, we heard that many times from Mr. Mitchell. That is not part of the willful contempt standard. We cited to you on page 16 of our opening brief numerous cases from intellectual property area that are nothing to do with automatic stay; it's simply not an element. It's -- what you need is a clear order, proof of noncompliance, and the contemnor has not diligently attempted to comply in a reasonable manner.

The willful cases from the automatic stay area and the discharge injunction are opposite. They are all related to the rights that protect parties in bankruptcy and there really is no ability to distinguish.

And let me just close with the closest thing that I think we have in terms of ability to rely on the judge in the very case. Okay. First of all, there is no principle

that until they decide that they are satisfied that you have given them a ruling, that they are -- only then and thereafter can they be said to be in contempt.

This is the Weitzman case, Weitzman v Stein, 98 F.3d 717. This was a case in which you had a district judge -- the same case -- the district judge deciding this conduct before me is not contemptuous. The Second Circuit reverses. On remand, the judge is asked to impose attorney's fees for that appeal that they had to take, that the Plaintiff had to take to reverse the district judge.

The district judge says, you know what, that is not on the Defendant, that appeal, that was on me. In fact, the statement is the direct judge reasoned that the fees and costs from appellant's first appeal were attributable to Defendant's attorney's -- excuse me -- were not attributable to Defendant attorney's wrongful conduct because the appeal was caused by, quote, "This Court's shortsighted view of the law in the circuit, not the Defendant's actions." The Second Circuit reversed on that point.

Anything -- it's the Defendant's problem. It's FirstBank -- it's exactly what you said, it's FirstBank that caused the situation, not Judge Daniels, and whether he got it wrong or got it right, the point is that he did not give the license that they are saying, and it's not fair to put on Judge Daniels this responsibility and just as this judge

in the Weitzman case thought it wasn't fair to put on the Defendant the responsibility for his own error, the Second Circuit says that's not the way the system works. We will not -- you do not have the discretion to do that. That was an abuse of discretion for the judge to deny those fees because he's the one that made the mistake and necessitated the appeal.

THE COURT: Let's assume something just for the sake of discussion. Assume that this was an adversary proceeding that was originally commenced in the Bankruptcy Court and was assigned to me because there was a determination made much like the determination made by counsel in Evergreen Solar, that the case belonged in the Bankruptcy Court to begin with. And there's a motion to dismiss, brought by Barclays and I scratch my head and say on a motion to dismiss standard, I'm just not sure and you proceed to complete discovery and then move for summary judgment and then on May 13th I decide in your favor.

In that circumstance, instead of having Judge Daniels at the District Court level considering documents without the benefit of having been present during the time of the sale hearing, hypothetically, I'm considering the clarification letter and I'm saying, you know, for purposes of a motion to dismiss, I'm just not sure, but I become sure later.

Is everything sanctionable?

MR. MORAG: Your Honor, I would say -- I would say two things. First of all, in Evergreen Solar, we did not have that situation, because if you recall, the first thing that Evergreen Solar did was brought on a preliminary injunction motion to stop --

THE COURT: I remember it.

MR. MORAG: Right. And in the course of that, you appropriately considered evidence that was submitted by witnesses and affidavits, which largely was the evidence that then becomes -- was part of the motion to dismiss record. Not because they had it all attached to their complaint, but because it was part of the case already.

THE COURT: Just as an aside, because we know the company ended up in bankruptcy, it was, as I recall, a remarkably pathetic example of the collateral damage caused by the Lehman bankruptcy filing because we had a company that was incapable, so it claimed, of financing itself because of the pledge arrangements made for its own shares. I remember it very well.

But I also had no difficulty, despite the sympathy that I had for their position, in finding in your favor.

MR. MORAG: Right. Now, I do think that the Bank of America litigation is relevant here to our position on this particular issue. What happened there is finally, Bank

of America filed it's adversary complaint to get an adjudication that they were entitled to do the setoff that they had already done.

Now, what does the debtor do? Okay, the debtor doesn't say, move to dismiss that complaint. Of course you couldn't do what you did and here are all the reasons why. They file an answer that says deny, deny, deny, we have affirmative defenses. They go through the discovery phase. They thought they were done when they did all their discovery cross-motions for summary judgment. You decided that you wanted to hear a witness or two, they came in for that and you had the full record.

Could you possibly argue -- what is the distinction between the LBHI's position in that case and this situation? LBHI acquiesced in discovery in letting this go through their normal process until you were in a position to make a decision. We were faced with Judge Daniels' decision. We thought it was simply on the basis of, as Your Honor said, of having to assume the correctness of the facts. This notion that he would never have let an enjoined case go forward, well, you know, within a few months, as they note, he issued his referral order. And in the referral order he said something different from what he said in the motion to dismiss hearing.

What he said in the referral order was that when

he was able to consider all the documents, including the clarification letter and schedule A, he observed that the oral argument, as we quoted in our papers, that sitting here today, I have no doubt that Judge Peck thinks that these were purchased assets, that's why I need to send this to him, quote, "Because the sale order did ostensibly transfer the collateral at issue from Lehman to Barclays, and any right the Defendant would have to the collateral would be established in the sale order; moreover, any remaining rights the Plaintiff has in the collateral would need to be determined by analyzing the effect of the Bankruptcy Court's sale order."

So he's already, at that point, on the understanding that this is -- looks like, very well, it's covered by the sale order, the only question is, do they have some sort of remedy nonetheless?

So, I don't think that Judge Daniels locked himself in, obviously, and certainly by the time of September 7, 2010, if you're looking for another date, was of the view that this was core because it arose in the sale order. If he had accepted their argument that there is no Bankruptcy Court jurisdiction here, they didn't consent to this referral, they fought it vigorously because why, because it's not a purchased assets, so it's not covered by the sale order. Well, this says it's core because it arises

in the sale order.

Finally, Your Honor, all of these arguments about attempting to retroactively apply summary judgment, that has no basis. In fact, again, we put them on notice repeatedly, and the point was we knew from what they told us that if we made a motion to you, their position before you would be that it should be deferred until after summary judgment, not, oh, sure, we'd love for Your Honor to decide this now because we think it will save the parties some money and expense if we turn out to be wrong. They've never worried about being wrong.

So we did file the motion for contempt before we had your summary judgment ruling and the argument of the contempt motion was that it is undisputed. It should be undisputed. You will find that it's undisputed. You will see that it's undisputed when you resolve the summary judgment, and that's what happened.

And what happened the moment that we filed the contempt motion? Will you stipulate to putting off the briefing on the contempt until after summary judgment? Yes, we agreed, not because we thought we were prejudicing ourselves, not because we thought that we were giving up anything, but because we thought Your Honor, in light of all the cases that have come before it would think that that is the logical way to do these things. And that's all we've

ever tried to do in this case, is the logical way of doing things, and rather than present more work to Your Honor on am I yet in a position to make a decision, then I'm going to have to actually side with the issue that you're presenting to me.

Our point all along is they've borne the risk. They've understood this risk. They resisted any attempt to come to you and say, we know that you're the author of the sale order. We know that you're the one that signed it. Look, we don't want to be in a position to find out years later that we violated it. They weren't willing to come with us to you and ask you and say it's appropriate for you to make this determination. That's in the letters; that's all before you. So we had no opportunity to do that.

THE COURT: Thank you.

MR. MITCHELL: Your Honor, may I respond just briefly?

THE COURT: Very briefly, please.

MR. MITCHELL: All right. First of all, Your Honor, counsel did not answer the question that you asked. You said, if the motion had been presented to Your Honor and you had said I'm just not sure based upon the pleading, and I think he didn't answer the question for a reason because if you're not sure, that means that you would not believe the sale order was sufficiently clear on its face for you to

make a determination on a motion to dismiss that the case was enjoined. So that would be a clear indication from this Court as to what your view was of the facial clarity of the sale order on a motion to dismiss to cover the claims in a particular case, and that is all Judge Daniels did, and that's how the case proceeds thereafter.

Subsequent to that, it needs to be brought back to Your Honor to change that if something changes. Counsel prefers to think ostensibly -- the reason this was referred back to the Court was because it concerned the sale order. Obviously counsel argued that all of these documents reflected that this was a purchased asset. We alleged that we did not believe it was a purchased asset. The ostensibly means that the language of the document seems to refer to it, but Judge Peck has to decide whether, in fact, it was a purchased asset. That's all the word ostensibly means in that circumstance.

With respect to putting FirstBank on notice, Mr. Morag's Exhibits 83 and 84, the exhibits to Mr. Morag's affidavit, 83 and 84, you'll see a letter in which counsel took the position was the Evergreen Solar decision, changed everything, and now in light of the Evergreen Solar decision, we should withdraw the case, and then says, quote, "Barclays will seek properly from the Court to enforce the sale order injunction," closed quote, as part of that letter

and then never acted on it.

And it was our response to Mr. Morag that if he believed that the Evergreen Solar case changed everything, we believed your 60(b) decision had language that controlled what we were -- controlled more specifically the facts of our case, that that should be brought to your by motion to renew the motion to dismiss; that would be the procedure. If there's new law, bring new law to the Court's attention and if that changes the decision, that changes the decision.

Your Honor, I just -- in closing, this is not -- this is not the same. The standard here is not the same as the standard on a motion for summary judgment. This is a question of the behavior of a party through the process of litigation to obtain a decision the Court said it was entitled to. All we did, though the Court took time, was production of documents, maybe eight depositions, and then presented a summary judgment motion to Your Honor. We didn't try a case in this court. It was presented on papers, mostly by stipulated fact.

I do not think obtaining an order in light of the denial of a motion to dismiss on such a concise and clear and defined record stipulated by parties to obtain Your Honor's ruling on whether, in fact, our securities were included is evidence of contemptuous conduct sufficient for the Court to sanction our client. Thank you.

THE COURT: Okay. Much longer argument than I expected and we managed to fill most of the afternoon. I'm going to take this under advisement and I'll issue a memorandum decision promptly.

MR. MITCHELL: Thank you, Your Honor.

THE COURT: We're adjourned.

(Whereupon, these proceedings were concluded at 3:59 p.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dawn South

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I, William J. Garling, certify that the foregoing transcript is a true and accurate record of the proceedings.

William Garling

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DN: cn=William Garling, o, ou, email=digital1@veritext.com, c=US
Date: 2013.10.25 16:09:41 -04'00'

AAERT Certified Electronic Transcriber CET**D-543

Veritext
200 Old Country Road
Suite 580
Mineola, NY 11501

Date: October 24, 2013